

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

NATIONAL HOT ROD ASSOCIATION)	
(NHRA),)	
)	
Respondent,)	Case Nos.: 02-CA-185569
)	22-CA-190221
and)	22-CA-192686
)	
INTERNATIONAL ALLIANCE OF)	
THEATRICAL STAGE EMPLOYEES,)	
(IATSE))	
)	
Charging Party.)	

NATIONAL HOT ROD ASSOCIATION)	
(NHRA),)	
)	
Employer,)	Case No.: 22-RC-186622
)	
and)	
)	
INTERNATIONAL ALLIANCE OF)	
THEATRICAL STAGE EMPLOYEES,)	
(IATSE))	
)	
Petitioner.)	

NATIONAL HOT ROD ASSOCIATION'S POST-HEARING BRIEF

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NOW COMES the National Hot Rod Association (“NHRA”), Employer and Respondent herein, and files its post-hearing brief as follows:

STATEMENT OF CASE

This case arises out of a representation proceeding and election objections filed by NHRA on December 9, 2016, and a series of unfair labor practice charges filed against NHRA by the International Alliance of Theatrical Stage Employees (“Union”) between September 2016 and August 2017.¹ On October 20, the Union filed a Petition for Representation with Region 22 of the National Labor Relations Board (“Region”) seeking to represent a unit of “event worker” television production employees employed by NHRA on an intermittent basis. (GC Exh. 1(s)).² Pursuant to a Stipulated Election Agreement, a secret mail-ballot election was conducted from November 15 to December 2 via U.S. Mail. (GC Exh. 1(s)). As of the most recent Tally of Ballots, out of approximately 99 eligible voters, 35 votes were cast in favor of the Union, 34 votes were cast against the Union, and two ballots were challenged by the Region. (P. Exh. 11). Because the challenges were sufficient to affect the outcome of the election, the Union was not certified.

NHRA filed timely election objections. (GC Exh. 1(s), Attachment B). The objections are premised on conduct by the Region that deprived a number of eligible voters that was sufficient to affect the outcome of the election an adequate opportunity to vote, and as a result disenfranchised them. Following an investigation, the Regional Director issued an Order Further

¹ All dates referred to herein are 2016 unless otherwise stated.

² Herein, Transcript page citations are referred to “Tr. __,” followed by the page number. General Counsel Exhibits are referred to as “GC Exh. __,” followed by the exhibit number; Respondent/Employer Exhibits as “R. Exh. __,” followed by the exhibit number; and Petitioner Exhibits as “P. Exh. __,” followed by the exhibit number.

Consolidating Cases, Partial Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections on September 8, 2017, which determined that the Employer's objections raised material issues warranting a hearing. (GC Exh. 1(s)). The Regional Director's September 8, 2017 Order further consolidated the Employer's objections for hearing with the Consolidated Complaint issued on August 31, 2017, which alleged various violations of the National Labor Relations Act based on the unfair labor practice charges filed by the Union. (GC Exh. 1(s)).

Specifically, the Consolidated Complaint ("Complaint") alleges that NHRA allegedly violated Section 8(a)(1) by soliciting employee grievances, threatening employees with unspecified reprisals, and creating an unlawful impression of surveillance; allegedly violated Section 8(a)(1) by making an unlawful statement to employees about job offers; and allegedly violated Section 8(a)(3) by terminating four employees.³ (GC Exh. 1(q) ¶¶ 9-14). On September 13, 2017, NHRA timely filed its answer, denying the material allegations in the Complaint and raising certain affirmative defenses, including that the terminations challenged by the General Counsel were made for lawful, non-discriminatory business reasons.⁴ (GC Exh. 1(u)). The Union and NHRA settled three of the four alleged Section 8(a)(3) violations through private settlements over the preceding several months, leaving one operative Section 8(a)(3) allegation relating to

³ On December 7, 2017, the General Counsel amended the Complaint to add an allegation concerning alleged complaints that employee James Dean made about a failure to provide sufficient meals to employees. (Tr. 12-13, GC Exh. 1(y)). However, on March 2, 2018, the General Counsel moved to amend the complaint once again to strike that allegation and also to strike the Section 8(a)(3) and (1) allegations related to Dean and Josh Piner due to the parties' private settlements of these claims. These requests were granted, and all of the allegations were dismissed from the Complaint. (Tr. 472-473).

⁴ On October 6, 2017, NHRA amended its answer to correct an inadvertent error and add an affirmative defense, which was ultimately dismissed by the Judge. (GC Exh. 1(x), Tr. 604).

Nathan Hess remaining in dispute. (GC Exh. 1(aa), Tr. 13). The two Section 8(a)(1) allegations described above still stand as originally alleged in the Complaint.

A hearing was conducted in Brooklyn, New York on December 7, 2017; February 27 and 28, 2018; and March 1, 2, 5, 12, and 13, 2018 before the Honorable Benjamin W. Green, Administrative Law Judge. NHRA now files its post-hearing brief. As discussed herein, and based on the record evidence and application of established Board precedent, the election here should be overturned, and each of the unfair labor practices alleged in the Complaint dismissed.

STATEMENT OF FACTS

A. Background

NHRA was founded by Wally Parks in 1951, in California, where the hot-rod culture was born. (R. Exh. 5, Tr. 478). It is the largest official sanctioning body for the sport of drag racing, and it sets the rules for the drag racing that it sanctions and hosts competitive racing events around the country. (Tr. 476, 477-483, R. Exh. 5). NHRA's mission is to preserve and promote the sport and to promote safety in the sport. (Tr. 476, 481-482, R. Exh. 5). Its principal place of business is in Glendora, California, although NHRA maintains satellite offices around country, including in Indianapolis, Indiana. (Tr. 475-476, 479, 498).

Each year, NHRA hosts a circuit of 24 large-scale events at race tracks in the United States featuring the NHRA Mello Yello Drag Racing Series, the NHRA Lucas Oil Drag Racing Series, and at selected events, the NHRA J&A Service Pro Mod Drag Racing Series, which are series of professional and sportsman-level races involving different classes of vehicles. (GC Exh. 18, Tr. 480, 481, 510-511, R. Exh. 5, p. 4). The events run between February and November, and they are open to the public. (GC Exh. 18, Tr. 481). The majority of the events last between three and four days, and generally begin on a Thursday or Friday and end on a Sunday, when the final

eliminations or championship races are held. (Tr. 481, 538, *see* GC Exh. 18). Television programs featuring the races and racing-related events are produced by NHRA's television production employees and are aired on the FOX/FOX Sports Networks. (Tr. 480, 531-532). The television programs use a combination of live footage and pre-recorded video clips and often are aired live as the races themselves occur. (*See* Tr. 538, 546-549, R. Exh. 4).

Executive Producer Ken Adelson ("Adelson") oversees and manages NHRA's television production operation and develops the creative content for each show. (Tr. 520-521). In managing the operation, Adelson is assisted by Technology Executive Michael Rokosa ("Rokosa") and Producer Peter Skorich ("Skorich"). (Tr. 520-521). As Technology Executive, Rokosa manages the budget for the operation, handles the hiring and scheduling of employees, and negotiates agreements with outside vendors contracted to help produce the shows, among other things. (*Id.*) As Producer, Skorich coordinated all of the video, audio, sound, and graphics elements necessary for each program.⁵ (Tr. 525-526, 557, 569). Both Skorich and Rokosa reported directly to Adelson, and together, all three supervised and managed the television production employees as necessary. (Tr. 520-521, 557-558, *see also* Tr. 435).

Vice President of Human Resources, Marleen Gurrola ("Gurrola") oversees and manages recruitment and staffing, employee-relations issues, and compensation and benefits, safety and workers' compensation issues for all of NHRA's employees, including the ones at issue here. (Tr. 484-485). Gurrola has held her Vice President position since August 2015, but has worked in various human resources roles at NHRA for over 21 years. (Tr. 475). In handling employee-relations issues, Gurrola directly and indirectly learns of and addresses work-related issues raised by employees, and it is her practice to periodically record notes of these issues when meeting

⁵ Skorich no longer produces television shows for NHRA.

with employees. (Tr. 488-491, *see e.g.*, GC Exh. 7). In 2016, Gurrola attended several racing events, including the race held in Pomona, California between February 11 and 14, the race held in Charlotte, North Carolina between September 16 and 18, and other races held after September 16, where she met with, and discussed work-related issues, complaints, or other matters, with both television production employees and other NHRA employees. (Tr. 508-509).

This case concerns NHRA's non-supervisory, "event worker" television production employees, often referred to as the "television production crew" (hereinafter referred to as "employees"). As discussed below, for the 2016 race season which began in February 2016, NHRA brought its television production in-house and hired its own employees to produce programs featuring NHRA's races and racing-related events. (Tr. 520-521).

B. NHRA's Television Production Operation and the 2016 Racing Season

Prior to 2016, ESPN Regional Television ("ERT") produced television programs featuring NHRA's races using ERT's employees, and those programs were broadcast on the ESPN Networks. (Tr. 232, 485, 517-519). In the summer of 2015, NHRA ended its relationship with ESPN and ERT effective as of the end of 2015. (*Id.*) In 2016, NHRA began producing television programs in-house with its own employees. (*Id.*, Tr. 484-485, 518-519). Effective for the 2016 race season, NHRA entered into a new agreement with FOX Sports Networks to telecast NHRA's programs. (Tr. 518-520). Under this agreement, NHRA was responsible to provide fully produced television programs to FOX/FOX Sports. (*Id.*) Thus, in 2016, for the first time in its history, instead of outsourcing television production, NHRA created an in-house production and broadcast department to create its own television programs. (Tr. 484-485).

An important part of the FOX agreement was that four programs per year would be aired on the FOX broadcast network as opposed to the FOX Sports cable network. (Tr. 538-539). The

salient portion of the Indianapolis, Indiana show on Labor Day 2016 was broadcast on the FOX broadcast network. (*Id.*)

In order to deliver fully produced television programs, between September 2015 and January 2016, NHRA began its ramp-up period for creating its new television production operation. (Tr. 484-485, 520). To this end, NHRA hired employees to produce programs for the 2016 racing season, some of whom previously worked for ESPN. (Tr. 484-485, 520-521). Prospective employees were given job memos or job offers describing their employment terms with NHRA for the 2016 racing season. (*See e.g.*, GC Exhs. 19, 20; Tr. 208). All employees hired by NHRA were hired as “at-will” employees and informed, in writing, that there was no guarantee of work for a specific number of events or continued employment beyond the 2016 racing season. (*See* GC Exhs. 19, 20). NHRA’s first self-produced broadcast was the first race of the 2016 season, namely the Pomona Circle K NHRA Winternationals, which took place from February 11 to 14. (GC Exh. 18).

The employees work for NHRA on an intermittent, as-needed basis. (Tr. 477-478). At any given racing event, there are approximately 45 employees working overall on the television production. (Tr. 484). They perform work that is standard in the television-production industry and necessary to ensure that the programs can air on the FOX/FOX Sports Networks as planned, such as operating cameras, handling the audio, video, and sound mixing for the show, or preparing on-screen graphics. (Tr. 213-214). Virtually all of the employees, except for the camera operators, perform their television production work from two trailers, which in 2016 were rented by NHRA from a company named F&F Productions. (*See* GC Exh. 22, Tr. 214, 241-243, 248). The trailers are usually stationed in a secured compound adjacent to the race tracks, and they contain all of the necessary technical and production equipment to edit and facilitate the

broadcast of the program. (*Id.*) Todd Veney, Robert Logan, Paul Kent, Nathan Hess (the alleged discriminatee), James Dean, and Josh Piner were all employed by NHRA in 2016 in various television-production-related positions as part of the Employer's television production crew. (Tr. 27, 37, 193, 208, 317, 388, 434).

At any given racing event, the typical work schedule for employees is more or less standardized and not in dispute. Unless approved to do otherwise, employees typically are to arrive on the morning of the first day of the racing event, usually a Thursday, or in some instances, one day prior. (Tr. 614, 625-626). The televised programs then begin on the second day of the event, usually a Friday, and usually last through Sunday. (Tr. 614, 629). Employees who travel to events typically return to their homes on Mondays. (Tr. 614).

On the days of the televised racing events, Adelson, Skorich, and Rokosa hold pre-production meetings every morning, where they review in detail "the rundown" of the day's show, which is a chart indicating the minute-by-minute sequence of the technical elements (e.g., live and pre-recorded video clips) required for the specific program. (Tr. 539, 628-629, 641-642, *see e.g.*, R. Exh. 4). All relevant employees receive a copy of the rundown prior to the show and use it to know when the technical elements they are responsible for are set to air in the overall sequence of the show. (*See id.*) Employees are expected to raise questions and address any issues that they may have regarding their work as reflected on the rundown at the pre-production meeting with Adelson, Skorich, and Rokosa to avoid errors during the show. (Tr. 546-548, 641-642). Once the broadcast of the show begins, employees are responsible for performing their assigned functions in the show and staying up-to-date on the show rundown to ensure that all their assigned elements of the show are in place and ready to air at the appropriate time. (Tr. 548-549, 645-646).

2016 was a year of learning for NHRA. NHRA had not previously produced its own television programs, did not have a template or prior year's budget to follow, and was met with certain challenges in developing its own production function, not atypical for a start-up operation. (*See* Tr. 96, 485, 528-529, 532-533, GC Exhs. 2, 3). By September, it became apparent that the 2016 television production operation was over budget and had to scale back. (Tr. 96). This was done, and for the last six races, NHRA implemented a cost-reduction plan that included scaling back an internet video feed for the remaining six racing events for 2016, limiting employee overtime, eliminating an additional camera operator, known as "camera one," among other cost-savings measures. (Tr. 531-533).

C. The Alleged Concerted Activities and NHRA's Response

Starting at the first NHRA racing event in mid-February and continuing through 2016, employees raised various work-related issues and concerns to NHRA. (Tr. 256-257, 391-396, 299-300, 418, 660). In particular, employees raised issues about the manner in which the shows were being produced and the quality and frequency of the meals that NHRA provided to the crew at the events. (Tr. 255, 390-396). At various times, they also raised additional concerns about per diem payments, safety, and sharing rental cars for commuting to and from the airport and racing events. (Tr. 299-300, 501). Employees also discussed these concerns among themselves. (*Id.*) NHRA worked with the employees to resolve these complaints. (*See* Tr. 489-491, 405-408, 500-501).

In early August, employees began meeting with Union Representative John Culleeny ("Culleeny") to discuss their work-related issues and sign union authorization cards to join the Union. (Tr. 166). The record demonstrates that the first union meeting took place on or about August 6 in Kent, Washington, coinciding with Seattle, Washington NHRA racing event held

during that same period. (Tr. 166, 258). Nathan Hess (“Hess”) testified that he attended this meeting, and that there were approximately six employees who attended overall. (Tr. 258). Hess signed a union authorization card at this meeting, later attended other union meetings in early September, and talked to other non-supervisory employees about the union during the same period of time. (Tr. 258-259).

Following the first meeting, the Union held additional meetings with employees, including one in mid-August at the Brainerd, Minneapolis race and two in early September at the Indianapolis, Indiana race. (Tr. 261-262, 264). With respect to the Indianapolis union meetings, employee James Dean testified that NHRA Director Jim Sobczak (“Sobczak”) was sitting in the public hotel bar adjacent to the meeting room where the Union decided to hold its meeting. (Tr. 399-400). Although Sobczak did not testify, Rokosa explained that Sobczak stayed at that hotel for the race along with other members of management. (Tr. 663-664). Rokosa further testified that it was common practice for Sobczak and other members of management, including Stoll, to stay at the same hotel as the employees.⁶ (*Id.*)

Further, the record demonstrates that NHRA Creative Director and supervisor Brian Stoll (“Stoll”) informed employees about the Union, and later invited and encouraged them to attend these union meetings where authorization cards were signed, including the first union meeting at the Seattle race in early August and the subsequent ones held at the Indianapolis race in early September. (Tr. 322-323, 331, 377-378, 431).

Members of NHRA’s staff, including Adelson and Rokosa, first became aware of general union activity in early September. (Tr. 536, 637-639). Adelson testified that first learned of the union activity on or around Sunday, September 4 at the Indianapolis race, when Stoll told

⁶ Sobczak did not surveil employees, and there is no allegation in the Complaint that he did so.

Adelson that Stoll had overheard “something about a union discussion” at the employees’ hotel. (Tr. 108-109, 536). During this conversation, Stoll did not identify any employees who were present at or who had participated in the “union discussion.” (*Id.*) Similar to Adelson, Rokosa first learned of general union activity by the employees on late Friday, September 2 when Frank Wilson, a FOX television producer, told him that a union had started organizing the employees. (Tr. 637-640). Wilson learned about the organizing campaign from a colleague who had spoken to Stoll, and Wilson did not identify any employees participating in the union campaign. (*See* Tr. 637-638). Further, Gurrola testified that she learned of the union activity around the same time as Adelson and Rokosa, and specifically on September 3. (Tr. 491).

That the Union had commenced an organizing campaign was later confirmed by the Union Representative Culleeny himself. Following the Indianapolis race, Culleeny attended the next scheduled racing event in Charlotte, North Carolina, held from September 16 to 18. (Tr. 176-177, GC Exh. 18). On one of the days of this race, Culleeny and another Union official named Jason Rosine entered the secured television compound where employees worked and approached Adelson stating: “Hi, my name is John Culleeny, this [is] Jason Rosine, we’re IATSE, did you know that you have an organizing drive going on?” (Tr. 176-177, 214). In response, Adelson acknowledged that he had become aware of the union activity. (Tr. 176). Following their conversation, Adelson asked Culleeny and Rosine to exit NHRA’s production work area compound. (Tr. 176-177).

NHRA’s response to the Union’s campaign from early September on was twofold. First, it trained Gurrola regarding her role in responding to employees’ questions and concerns about the organizing. (Tr. 492-493). Second, NHRA held two large meetings and circulated lawful campaign materials through email in order to provide employees with information about union

organizing and the election process. (GC Exhs. 8-11, 26(a), 26(b), 27(a), 27(b)). NHRA's first meeting was held on or around September 16 at the Charlotte, North Carolina race. (Tr. 493-495). Gurrola was present at this meeting and spoke to employees from a prepared list of five or six message points that acknowledged that the Union was attempting to organize the employees, and that NHRA was opposed to a union representing them. (Tr. 493-497, GC Exh. 26(b)). At no point did Gurrola threaten employees for engaging in their union activities. (*See id.*) Without Gurrola's or NHRA's knowledge, this meeting was recorded by James Dean, and both the audio recording and transcription of what Gurrola said is admitted in the record. (GC Exh. 26(a), (b)). Gurrola reviewed the transcript and does not dispute that the statement appears to reflect her opinions expressed on September 16. (Tr. 496). The transcription provides:⁷

GURROLA: . . . doing an incredible job, I give Ken and Pete my feedback all the time, I mean it's fabulous, it's really incredible and of course this is the one area that I really don't know anything about which is why I'm here. You know, I wanted to come out, I wanted to get to know some of you a little bit better and find out really how you guys do it, uh, all the work . . . and I'll try to do my best and I'll be here till Sunday to get an opportunity to do that.

But I also wanted to talk about another really important thing that has come up and that is the union . . . 'cause I know that some of you have been approached and talked to about perhaps going in the union . . . and I wanted to have the opportunity to tell you what we think about it, ok, what I personally think about it [unintelligible] human resources.

You all have every right . . . and I don't want to make any qualms about it, you have every right to talk to a union rep . . . to engage in conversations with them and [unintelligible] and even vote the union in if that is what you choose to do. But, I want to tell you that, you know, I want to tell you what NHRA thinks about it or what I think about it as a matter of fact in human resources.

⁷ Certain annotations in the transcription noting "background noise," interruptions by an unidentified male (most likely Ken Adelson), and paragraph breaks that appear to have been inserted into the transcription to highlight certain of Gurrola's statements have been removed here to make the statement easier to read.

Um, we don't feel that it is, it is a productive thing to-uh-a relationship to get into. For starters, uh, and there are consequences, okay? A lot of you may or may have not been asked to sign a card to join the union and by doing so, you should know a couple of things. One is, that you are giving them the right to represent you whether there is a vote or not a vote. And, we don't want you to sign the card. We don't feel there's a need to do that. Once you entered into—once there's a union, there's now a third party in our relationship.

If I [background noise] right now, if you have issues or anything you wanted to discuss, [pause-background noise] you can come to me. Bring them to our attention and we'll, you know, we'll look into it. Um, that's what I do. You know, we've been, we've been in existence for sixty-five years. We built this business without a union. Where, we, we respond and [unintelligible — background noise] and I have a ca . . . my card too, I mean, you're always welcome [unintelligible — background noise]. That's the nature of our work[.]

I don't know how you guys do it [unintelligible]. Um, bring them to my attention. I mean, I want to give you the opportunity certainly to really to tell you that, you know, that's my job in HR. um, [sic] if I know about it, you can, you can contact me via my [unintelligible] my uh my office phone, email, I'll get back to you confidentially. I mean, give us an opportunity to fix issues. The . . . uh . . . so uh, you know, we have good practices, good policies in place to help the employees, that's what my job is . . . I'm a hundred percent for you guys out there. To make this a good working relationship between the two of us. When you bring the union in, that model goes out the door. Just so you know.

There's a lot of you that are here, that may have been in a union at some point and if so, you know, talk to your peers and find out whether a union worked for them or not. There's a reason only seven percent of the private sector has unions representing them. You know, do you really want to pay them to, what . . .

If they're making promises to you, get them in writing. Because I want, you know, you wanna know what are they going to do for you . . . for the money you're going to pay them. I mean that's how they stay in business, with dues, and you know, I guess back in the olden days and in some industries, perhaps unions played a part in it and that is back in the personnel days when you just sign papers.

Now, we have a very interactive process, and I want you to know that. I wanted to make sure you know . . . I'm not going to remember all of you by name other than some of my employees that I have, you know, full time that I know [unintelligible — background noise] you know, talk to

me. I'll, I'll be around if you have anything privately you want to talk about or you wanna corner me somewhere, I'm around. That's why . . . That's one of the reasons why I came out. I typically go to Indy but I had surgery, couldn't do it. Now, here this weekend, and, um, and that's what I wanted to tell you.

I really wanted to come in and communicate that message to all of you, you know, that you know, what our position was on that, and you know, to thank you for all of your hard work and doing a tremendous, uh, tremendous job and working very hard. And I really don't know when they say cameramen, I have no idea what that means other than Lauren over there with a camera here. I'm sure that's not all of it.

So, um, any-any questions, I mean you know, I'm not going to take any questions now, because we don't have time, Ken has a lot of stuff to do [unintelligible — background noise] but I will, um, I'll be around.

So, anything else, Ken, you want to add on that subject?

(GC Exh. 26(b)).

The second meeting was held in late October at an NHRA racing event in Las Vegas, Nevada, which took place from October 28 to 30. (GC Exh. 27(a), (b)). At this meeting, Adelson again informed employees of NHRA's view that it was opposed to unionization. Adelson's statement was transcribed and is admitted in the record. (GC Exhs. 27(a), (b)). Notably, the Region has not alleged that Adelson's statements at this meeting violated the Act.

After holding these two meetings, NHRA distributed a video and series of additional emails informing the employees about voting in the election and expressing additional views and opinions about the Union. (GC Exhs. 8-11, P. Exh. 5). Neither the video nor the emails are alleged to have independently or collectively violated the Act.

D. Nathan Hess's Termination

The General Counsel alleges that on September 14, NHRA terminated Nathan Hess because he joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities. (GC Exh. 1(q) ¶¶ 11, 12, 14).

Hess was initially hired by NHRA on November 30, 2015, as a Pit Producer. (GC Exh. 19, Tr. 219). However, he was not scheduled to begin working for NHRA until the 2016 racing season began in February. (GC Exh. 19, Tr. 208, 210). Although Hess was originally hired as a Pit Producer, he in fact worked in the position of Tape Producer for the duration of his employment and until his termination on September 14. (Tr. 208, 523-524). He was supervised by Skorich, Rokosa, and Adelson. (Tr. 218). Adelson testified that while Hess had limited experience performing tape-producer-type duties, having only previously performed the work on eight to ten occasions when he was employed by ESPN, Adelson decided to take “a chance on someone less experienced . . . [who] could grow into the position.” (Tr. 523). Hess’s agreed-upon rate of pay, excluding any fringe benefits, was \$500 per day. (Tr. 524). On September 1, Hess received a pay raise from \$500 to \$525 per day to fulfill a promise that Adelson had made at the time that Hess was hired to raise his pay as time went on. (Tr. 526-527, GC Exh. 20).

Hess described his primary duties and responsibilities as a Tape Producer as being organized and ensuring that video clips were in place and ready to air during the program:

*Main duty is really to be organized . . . You need to show up, have every – what we had is we had flashbacks, so on Thursdays, we would load all of our flashbacks, which is video from the past, so we could have – in case anything happened . . . You are to work with the producer, to plan out the needs for the needs for the week, the race via – through tape, replay or pre-produced items. **You are also the hub for a lot of things, for – anything that’s coming up that you’re going to air**, going to break, you need to tell graphics, hey, graphics I got this video, have this graphic ready, **so everything seamlessly airs going to break**, or coming back from break. You’re producing live packages or pieces of video . . .*

*[Y]ou try to anticipate everything, and you try to be at least a few minutes ahead, so you can have everything, and you try to be at least a few minutes ahead, **so you can have everything ready when it’s actually needed.***

(Tr. 223-225) (emphasis added). Hess testified further that he remained about “one page and a half ahead” on the rundown chart to ensure that all of the video clips required for the show were available, in place, and ready to air at the appropriate time. (Tr. 225). In essence, Hess’s job was to organize all of the video clips in the proper file formats in a computer system called the “Xfile 3” to make sure that they would be immediately available and ready to be put on the program through the EVS broadcast equipment when the producer and director called for them. (See Tr. 525-526, 651-652).

During Hess’s eight months of employment, Hess performed adequately, although there were several issues that arose regarding his behavior and performance. First, for at least two events in late March and in early April, Hess arrived to the racing event one day in advance without authorization from Adelson or Skorich. (Tr. 625-628, *see* R. Exh. 7, p. 2, 9 (April 18 email from Rokosa to Skorich stating “I am denying this, this is Nate picking Wednesday travel again), GC Exh. 8, p. 2 (March 23 email from Rokosa to Skorich stating “Nate is putting in for Travel Work on Wednesday with full per diem and overtime.”). The record further demonstrates that Hess encouraged at least one other employee, Todd Veney, to travel one day early to a race to earn additional wages. (Tr. 614-616). Second, with regard to his performance, the record reflects that as early as March 23, Adelson and Skorich expressed concerns about Hess’s abilities and skill as a tape producer. On March 23, in the context of discussing Hess’s unauthorized travel, Adelson emailed Skorich and stated: “I’m still not thrilled with his overall performance and not sure if he’s out [sic] guy for the long term.” (R. Exh. 8, p. 1).

The incident resulting in Hess’s termination occurred on Monday, September 5, during the final day of the Indianapolis race. The Indianapolis race is NHRA’s premiere show of the

year, and part of the final day is aired live on the FOX Network. (Tr. 538). It is undisputed that Hess was aware of the importance of this broadcast. On this point, he testified:

- Q: Did you understand the importance of the Indy race in NHRA?
A: Most definitely. Yeah.
Q: Tell me what your understanding was.
A: The big race, you know, anytime you're on a network, Fox is important so yes, most definitely.

(Tr. 291-292).

With regard to the events on September 5, Adelson and Rokosa testified that during the broadcast, Hess failed to have four video clips in place and ready to air – one of which was for NHRA's largest corporate sponsor, Mello Yello.⁸ (Tr. 548-553, 647-650). Adelson investigated what occurred and determined that Hess failed to air the video clips, and as such, should be terminated. (Tr. 553-557). At the hearing, Adelson confirmed that the following four clips did not air: (1) a one-minute-and-fifteen-second clip titled "Visitors' Guide To Indianapolis," which was supposed to air at 1:45 p.m.; (2) a two-minute clip titled "Mello Yello in the Spotlight – JR Todd and Crampton Workout Feature, which was supposed to air at 2:07 p.m.; (3) a one-minute-and-thirty second clip titled "Del Worsham's Mello Yello Feature," which was supposed to air at 2:15 p.m.; and (4) a one-minute-and-five-second clip titled "Tony P Race Worsham in a Toyota Feature," which was supposed to air at 2:55 p.m. (Tr. 548-553, R. Exh. 4). The Del Worsham's Mello Yello Feature was the video clip created especially for NHRA's sponsor, Mello Yello. (Tr. 647, 679-680, 684).

On or about September 7 or 8, Adelson spoke to Rokosa and Skorich about Hess's failure to air the clips. (Tr. 554-555). All three discussed the negative impact that the failure had on the

⁸ Mello Yello is a soft drink distributed by Coca Cola. (<https://www.melloyello.com/>). When this clip did not air, Mello Yello complained to NHRA about it. (Tr. 553-554).

quality of the Indianapolis show. (See Tr. 554-556, 652-653). During this conversation, Rokosa further informed Adelson that Rokosa had checked the Del Worsham's Mello Yello Feature and found that it was in fact available on NHRA's server at the time of broadcast and thus ready to air. (Tr. 557, 652-653, 677-681). Rokosa had learned that the clip was available to air from NHRA Associate Director Katie Stoll, who had informed Rokosa on September 5 that the Del Worsham's Mello Yello Feature was on NHRA's server at the time of show. (Tr. 557, 677-681).⁹ Reviewing all of information, Adelson determined that Hess had failed in a critical respect and terminated him as a result. (Tr. 554-558). Adelson further testified that he felt "distraught" because the clips did not air and stated that Hess's actions "put the [NHRA's] show in jeopardy." (Tr. 554-557). He further stated that given that in his 35 years of experience in the production industry he had never witnessed an employee fail to have so many video clips ready for air during a live show, it appeared that Hess's actions were "intentional" or at least demonstrated that Hess lacked the skill or ability to perform a critical job function. (Tr. 554). Rokosa was in the production trailer when the Mello Yello clip did not air and he testified there was "panic" in the production room when it did not air as planned. (Tr. 647). On September 14, Skorich informed Hess via telephone that Hess had been terminated for his poor performance at the Indianapolis race. (Tr. 303). Hess corroborated that the reason Skorich provided for the termination was Hess's performance at the Indianapolis race. (*Id.*)

Hess's version of events from September 5 conflicts somewhat with Adelson and Rokosa's version, although Hess does not dispute the fact that video clips did not air during the Indianapolis race television program. (See Tr. 301-302). Hess testified that he was aware that at

⁹ Rokosa further testified that following this incident, the production crew experienced no issues with the Xfile 3 device, and it was not repaired or replaced, suggesting that the device was working properly at the time of the Indianapolis race. (Tr. 661).

this race, like others, it was his responsibility to ensure that scheduled video clips were in place and ready to air during the program. (Tr. 302, 313). However, he explained that the reason for his failing to air the clip was because the Xfile 3 device malfunctioned on September 5, preventing him from having the clips ready for the show. (Tr. 269-272). In particular, on the morning of September 5, Hess and other employees met with Adelson and Rokosa, as they normally would, to review the rundown for the show. (Tr. 267, 300-301). Hess discovered that the Xfile 3 device was not functioning “shortly after 10:00 a.m.,” which is when he allegedly told Adelson, Rokosa, and Skorich about the problem. According to Hess, Adelson, Rokosa, and Skorich responded to this news in a manner suggesting that “it didn’t seem like a big concern to them.” (Tr. 301). Hess later testified that he and James Dean tried to repair the Xfile 3 device, but were unable to do so, and certain video clips did not make it to air. (Tr. 268-273). Hess also asked Billy West (“West”), an engineer for F&F Productions to assist with the Xfile 3 device.¹⁰ (Tr. 269). Ultimately, Hess testified that certain clips could not load, were lost, and did not air. (Tr. 271-272). Adelson and Rokosa both denied that Hess informed them of the problem with the Xfile 3 device on the morning of the race. (Tr. 567-568, 647, 684).

Finally, NHRA Director of Broadcasting Operations Rob Hedrick (“Hedrick”) testified that on September 5 there were multiple occasions where Skorich or Adelson called Hedrick to

¹⁰ Billy West (“West”), who did not testify, later allegedly generated a technical report from this race, stating: “X-File 3 was not able to upload or download a MP-4 file we could trans code a MOV file both ways, thinking that we may need to re-install trans coding software will talk with EVS in Charlotte [*sic*]”. (GC Exh. 25, p. 19). Marc Orgera (“Orgera”), the Vice President of F&F Productions, testified that from West’s report there is no way to determine that West actually inspected the Xfile 3 device to determine for himself what the issue was. (Tr. 370). Also, Orgera stated that the Xfile 3 device worked properly for the remainder of the 2016 racing season and was never replaced. (Tr. 369-371; *see also* Tr. 647). Orgera also stated that West regularly failed to submit his reports in a timely fashion and was later released from his position for job performance issues. (Tr. 369-370, 372-373).

report that they were missing video clips that Hedrick had already provided to Hess for the show. (Tr. 719-720). Hedrick then provided Hess the clips for a second time, suggesting that Hess had misplaced the clips. (Tr. 702-703, 719-720). In describing Hess's performance at the Indianapolis race, Hedrick stated: "I would say there was a lack of organization in the tape room that day." (Tr. 702-703). Hedrick further estimated at the hearing that if a problem with the Xfile 3 device had been reported to the appropriate individuals, it could have been resolved in about 10 to 15 minutes, using another program called Adobe Media Encoder. (Tr. 695, 711).

Hedrick also testified that based on the reel of video files that Hess sent back to NHRA after the end of the Indianapolis race, *i.e.*, the "melt," it appeared that the Xfile 3 device was functioning on the day of the race because in order for files to exist in the melt, they had to have been processed using the Xfile 3 device. (Tr. 707). Further, based on the file directory of the melt, it appeared that the "PitFit WORKOU-045-4-SEP-2016" clip, one of the four video clips that Hess had claimed was not available due to a malfunction of the Xfile 3 device, was in fact available as it existed in the correct format among other video files that had aired on the day of the race. (Tr. 701, 703-705, 710, R. Exhs. 4, 9). Notably, this clip is a different clip than the Del Worsham's Mello Yello Feature clip that Rokosa independently learned was also available for air. (*See* Tr. 679-680, 704, R. Exh. 9). Accordingly, at least two of the four video clips that Hess claimed were not available due to a device error during the show, appear to have been available on the day of the race.

E. Allegations Involving Marleen (Stella) Gurrola

The General Counsel further alleges that Vice President of Human Resources Marleen Gurrola allegedly committed several violations of the Act through her statements at a meeting she held on September 16 with employees at the Charlotte, North Carolina racing event. (GC

Exh. 1(q) ¶ 9). In particular, the General Counsel alleges that NHRA, through Gurrola, violated Section 8(a)(1) by soliciting employee grievances, threatening employees with unspecified reprisals, and creating an unlawful impression of surveillance. (*Id.*) These allegations are largely premised on Gurrola's statement communicated to employees during the September 16 meeting. The complete text of the statement, as transcribed by the General Counsel, is set forth in Section C above.¹¹ In addition to her statement, employee James Dean testified that following Gurrola's prepared remarks at this meeting, Gurrola spoke to him and others about work-related issues, including the manner in which NHRA paid out per diems to employees. (Tr. 406).

F. Allegation Involving Michael Rokosa

Paragraph 10 of the Complaint alleges that on November 15, Rokosa sent an email to employees that allegedly stated that NHRA would delay making job offers for the 2017 racing season. (GC Exh. 1(q) ¶ 10). The text of Rokosa's email is set forth in full hereinafter in the Argument section of this brief. (GC Exh. 6).

G. The Mail-Ballot Election and Election Objections

The Union filed its Petition for Representation on October 20, seeking to represent "[a]ll broadcast technicians employed by NHRA." (GC Exh. 1(s)). As noted above, a mail-ballot election was conducted by Region 22 pursuant to a Stipulated Election Agreement between November 15 and November 30 to determine whether the Union would become the certified bargaining representative of NHRA's television production employees. (GC Exh. 1(s)). Eric Pomianowski was the primary Board Agent assigned to conduct the election, and Board Agent

¹¹ As noted elsewhere, Gurrola does not dispute that the transcription is largely representative of her statement. However, NHRA notes that the audio recording of Gurrola's statement is admitted in the record and is a more accurate presentation of Gurrola's message both as to its content and tone.

Frank Flores assisted him as well. (*See* R. Exh. 10). Mail ballots were to have been mailed by the Region on November 15 and returned by November 30, and counted thereafter on December 2. (P. Exh. 1). An initial ballot count and Tally of Ballots were made on December 2, which reflected that of the 99 eligible voters, 33 votes were cast for the Union, 22 votes were against the Union, and there were 17 challenged ballots, a sufficient number to affect the outcome of the election. (P. Exh. 10). Subsequently, the Union withdrew its 15 challenges, leaving two challenges by the Region. (GC Exh. 1(s)). Following withdrawal of the Union's challenges, on August 16, 2017, a second Tally of Ballots was held, which reflected that 35 votes were cast for the Union, 34 votes were cast against the Union, and there remained two challenged ballots by the Region.¹² (P. Exh. 11). Since the remaining challenges were sufficient to affect the outcome of the election, the Union was not certified.

Following the initial Tally of Ballots, NHRA timely filed objections to the election on December 9, asserting that the Region's conduct in the election failed to provide eligible voters with an adequate opportunity to vote and disenfranchised at least four eligible voters as a result. (*See* GC Exh. 1(s), Attachment B). Specifically, NHRA asserted that (1) several voters encountered problems obtaining a ballot from the Region in sufficient time to vote in the election (Objection 1); (2) as a result, NHRA believed that the Region had not mailed all ballots on the agreed-upon distribution date (Objection 2); (3) the Region failed to comply with the Board's

¹² The challenges by the Region concern votes by (1) Nathan Hess, the alleged discriminatee, who, because of his termination did not appear on the voter list, but was able to vote nonetheless; and (2) Josh Piner, who, like Hess, because of his termination did not appear on the voter list, but was able to vote nonetheless. Neither of these votes should count because, for the reasons stated herein, both Hess and Piner were lawfully terminated prior to the election and thus ineligible to vote. Further, Piner executed a settlement agreement with NHRA on claims surrounding his termination, which contained a release and non-admission clause negating any such argument that Piner was terminated unlawfully and thus should have been eligible to vote.

basic guidelines for carrying out mail-ballot elections as set forth in Part Two of the NLRB Casehandling, Representation Proceedings, with respect to having a person readily available for voters to call with questions and requests for duplicate ballots (Objection 3); (4) as a result, voters had difficulty contacting an official at the Region to determine why their ballots had not been received in a timely manner initially, had to leave repeated voicemails, and thereafter, did not receive timely responses to requests for duplicate ballots or the duplicate ballots themselves (Objection 3); (5) eligible voters Robert Logan, Paul Kent, and Patrick Ward did not receive their ballots in a timely fashion and were unable to reach the Region to request duplicate ballots in sufficient time to vote (Objections 4, 6, and 7); and (6) eligible voter Todd Veney's ballot, although mailed on November 28 – a date when he could reasonably anticipate timely receipt by the Region through the normal course of the mail – was not counted in the election and should be as it was timely when mailed (Objection 5). (GC Exh. 1(s), Attachment B).

Although much evidence was presented on the election, the issue at the heart of NHRA's objections is whether the Region's actions or lack thereof deprived a number of eligible voters, sufficient to affect the election outcome, an adequate opportunity to vote and disenfranchised them.

1. Robert Logan

Robert Logan was employed by the Employer in 2016 as an HC Hard Camera operator. (Tr. 599). He is listed on the voter list and is an eligible voter. (R. Exh. 3, p. 20). At all relevant times, including during and from November to December 2016 (the period of time during which mail ballots were sent by and returned to the Region), Logan resided at the exact address provided to the Region during the election period. (Tr. 48-49, R. Exh. 3, p. 20). Logan was aware of the election and aware that ballots were scheduled to be mailed on November 15. (Tr. 38).

Logan testified that he did not receive his ballot in the mail within a reasonable period after the Region's scheduled mailing date. (Tr. 38). As a result, on November 23, Logan called the Regional Office to report that he had not received his ballot and to request a duplicate one. (Tr. 38-39, 56). The telephone number Logan called, (973) 645-2100, was the one provided on the Notice of Election, which states in relevant part:

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, November 21, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (973) 645-2100 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

(P. Exh. 3, Tr. 38). This number connected Logan to a generic, automated answering machine. (Tr. 38, 601, R. Exh. 5). Logan left a voicemail, in which he identified himself, stated that he had not received his ballot in the mail, and requested a duplicate one. (Tr. 55, 601). After receiving no response, on November 25, Logan once again called the telephone number listed on the Notice of Election. (Tr. 602, R. Exh. 5). Logan left a second voicemail, noting that he had still not received his ballot and requesting a duplicate one. (*Id.*) The Region did not respond to either of Logan's voicemails before the end of the voting period. (Tr. 40, 47).

Thereafter, on or around November 26, Logan emailed Union Representative John Culleeny and NHRA Vice President of Human Resources Marleen Gurrola to inquire about contacting the Region about his missing ballot. (Tr. 46, 56-58). Culleeny provided Logan with a direct telephone number for Board Agent Frank Flores. (Tr. 39). Logan called Mr. Flores on November 30, 2016 to explain that Logan had not received his ballot and that he needed his ballot sent to him to timely vote in the election. (R. Exh. 5, 10; Tr. 39, 55-56, 58). During this conversation, Mr. Flores told Logan that the Region was experiencing difficulties with mailing

the ballots for the election to voters across the country.¹³ (Tr. 39). Mr. Flores further stated that the Regional Office's number listed on the Notice of Election and Instructions to Employees was not the correct number and was not monitored by the Region. (Tr. 55, 603). Logan requested that Mr. Flores mail him a duplicate ballot, and Mr. Flores stated that the Region would send a duplicate ballot as quickly as possible to allow Logan sufficient time to vote before the deadline. (Tr. 39-40). Logan received his initial ballot on December 5, 2016 – five days after the end of the voting period. (Tr. 39). Logan received his duplicate ballot on December 7, 2016 – seven days after the end of the voting period. (Tr. 39). Logan never voted in the election, although he explained at the hearing that he “really wanted to vote.” (R. Exh. 3, p. 6; *see* Tr. 39). Regarding his experience with the election, Logan testified:

I was a little bit mad, you know, a little upset because I really wanted my vote to count. *And I really wanted to vote. And I need to vote and the general thing after that was, I mean, it didn't really matter it seemed like to anyone that I did or didn't vote.*

(Tr. 41) (emphasis added). Logan echoed a similar sentiment in a January 2017 email to the Union Representative, stating:

I still care.
I still would have liked to vote . . .
I just don't trust the legal system
Thanks for getting back with me.

(R. Exh. 2) (emphasis added).

2. Paul Kent

Paul Kent was employed by the Employer in 2016 as an EVS Replay Operator. He is listed on the voter list and is an eligible voter. (R. Exh. 3, p. 19). At all relevant times, including

¹³ On January 3, 2017, Union Representative John Culleeny also informed Logan that Mr. Culleeny was aware that the Region had problems mailing ballots to eligible voters in a timely manner nationwide. (R. Exh. 2).

during and from November to December 2016 (the period of time during which mail ballots were sent by and returned to the Region), Kent resided at the address provided to the Region during the election period, although he testified that his address is 769 Markdale Street, as opposed to 769 Markdale Road, which is the address listed on the voter list. (*See* Tr. 198). Similar to Logan, Kent also did not receive his ballot within a reasonable period after the scheduled mailing date. (Tr. 195). As a result, on November 25 at 11:32 a.m., Kent called the Regional Office at the number listed on the Notice of Election. (Tr. 195-196). The Region provided a transcription of this voicemail, and it states:

Hey Eric my name is Paul Kent and, ah, I did not receive a ballot of the NHRA union. I was hoping you could overnight me one [TEXT REDACTED IN ORIGINAL] so again my name is Paul Kent. I'm sure you have all the information but I did not receive my ballot for the NHRA union vote so I need one hopefully in the mail today and I can either get it tomorrow or Monday and sent it right back out Monday, so my phone is [TEXT REDACTED IN ORIGINAL].
Thank you.

(R. Exh. 10, p. 7). Kent also emailed the Region to inform it that he had not received a ballot. (Tr. 195). Neither Kent's voicemail nor email was returned, and Kent did not receive a ballot before the voting period closed. (Tr. 205-206). The Region's records show that it mailed Kent a duplicate ballot on November 29, four days after his voicemail and email. (R. Exh. 3, p. 9). Kent ultimately received his initial ballot on December 9 and completed and mailed it in to the Region on December 10. (Tr. 197). The ballot was received by the Region on an unknown date and not counted. (R. Exh. 3, p. 19).

3. Todd Veney

Todd Veney was employed by the Employer in 2016 as a Pit Producer. He is listed on the voter list as an eligible voter. (R. Exh. 3, p. 25). At all relevant times, including during and from November to December 2016 (the period of time during which mail ballots were sent by and

returned to the Region), Veney resided at the exact address provided to the Region during the election period, and he was aware of the election and that ballots were scheduled to be mailed on November 15. (Tr. 27-32). Veney testified that he did not receive his ballot within a reasonable period after the scheduled mailing date. (Tr. 27-28). Unlike Logan and Kent, however, Veney eventually received a ballot on November 28, at which point he completed it, placed it in the return envelope provided by the Region and mailed it back to the Region via two-day Priority Mail at his local Post Office that same day. (*See* Tr. 27-28, 30). Recognizing that November 28 was close in time to the end of voting period, Veney paid \$5.98 to ensure his ballot would arrive at the Regional Office in Newark before the close of the voting period. (Tr. 30, R. Exh 1). Although Veney's ballot was mailed on November 28 and it should have been delivered to the Region no later than December 1 (one day before the count and within the Board's grace period for late-received ballots), it was not stamped "received" by the Region until December 5 and was not counted in the election. (R. Exh. 1; R. Exh. 3, p. 25).

4. Patrick Ward

Patrick Ward was employed by the Employer in 2016 in the A2 Audio Assistant position. (R. Exh. 3, p. 25). He is listed on the voter list as an eligible voter. (R. Exh. 3, p. 25). Ward did not testify. On November 22, Ward emailed Board Agent Eric Pomianowski, informing him that he had not received a ballot, and requested a duplicate one. (R. Exh. 10, p. 5). The Region mailed Ward two duplicate ballots on November 23 and 29, which Ward returned. (R. Exh. 3, pp. 8-9). His ballot was postmarked December 1 and marked as received by the Region on December 9. (R. Exh. 3, pp. 10-11). Ward's vote was not counted in the election. (R. Exh. 3, p. 25).

ARGUMENT

A. Applicable Legal Standards for the Objections

In all mail ballot cases, all eligible voters must be afforded “an adequate notice and opportunity to vote,” and not be “prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election.” *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987). “The fundamental purpose of a Board election is to provide employees with meaningful opportunity to express their sentiments concerning representation for the purposes of collective bargaining.” *Id.*

The Board “applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its election proceedings.” *Garda CL Atlantic, Inc.*, 356 NLRB 594, 594 (2011). Under that standard, “an election will be set aside if the objecting party shows that the number of voters *possibly* disenfranchised by an election irregularity is sufficient to affect the election outcome.” *Id.*, citing *Wolverine Dispatch, Inc.*, 321 NLRB 796, 796-797 (1996) (emphasis added). In other words, “when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted.” *Baker Victory Services, Inc.*, 331 NLRB 1068, 1069-1070 (2000), quoting *V.I.P. Limousine, Inc.*, 274 NLRB 641, 641 (1985). “If there is a *reasonable possibility* that this occurred and a determinative number of votes are called into question, to maintain the Board’s high standards, the election must be set aside.” *Id.* at 1070 (emphasis added). Thus, the mere possibility that even a single voter was disenfranchised can serve as a sufficient basis for the Board to set aside an election where that vote can be determinative. *Garda CL Atlantic, Inc.*, 356 NLRB at 594 (objecting party need not prove that voters did not vote due to complained-of

actions, only that it is possible that they did not vote for such reasons); *Wolverine Dispatch, Inc.*, 321 NLRB at 796-97 (objecting party need not prove that eligible voters attempted to vote during the short period of time that Board Agent was away from polling site, only that “it is possible that [] eligible voters arrived at the polling area to vote during the hiatus”).

In several cases, the Board has ordered that an election be set aside as a result of conduct by the Region that fails to provide an adequate opportunity to vote in a mail-ballot election. For example, in *North American Aviation, Inc.*, 81 NLRB 1046, 1049 (1949), the Board, in ordering a new election, found that a “chain of events leads us to the conclusion that the desires of eligible employees involved herein may not have been given adequate opportunity for expression,” and that there was a “reasonable doubt as to whether all eligible employees were given a fair opportunity to vote in an election the results of which under Section 9(e) of the Act are to be tested by the majority of those eligible to vote.” This “chain of events” included, among other things, election irregularities such as voters not receiving their mail ballots from the Region in a timely fashion and voters being unable to so inform the Regional Office by telephone about the non-receipt of their ballots because of continuous busy signals. 81 NLRB at 1048.

In *Star Baking Co.*, 119 NLRB 835, 836 (1957), the Board rejected the employer’s assertion that a representative election had been held where 28 of the 34 employees returned mail ballots, and ordered that a new election be held because one employee, whose vote was determinative, did not receive a mail ballot:

[I]t is the responsibility of the Board to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible voters, not merely a representative number, be given the opportunity to vote. It is particularly important to remedy the failure to discharge this responsibility where, as here, the vote of the employee who failed to receive a ballot could have affected the results of the election.

The Board also rejected the employer's argument that it must be shown that the disenfranchised employee would have voted if he had received a ballot, finding that because the employee was stationed 45 miles from the polling place, he did not have an adequate opportunity to vote despite knowing that he could have voted in person. *Id.* at 836; *see also Oneida County Community Action Agency*, 317 NLRB 852 (1995) (Region's failure to mail duplicate ballots to two employees could have affected the election results and necessitated setting it aside); *Davis & Newcomer Elevator Co.*, 315 NLRB 715, 715 (1994) (finding that Region's failure to furnish an employee with a duplicate mail-ballot election kit was not a minor error because vote could have been determinative in the election); *Garda CL Atlantic, Inc.*, 356 NLRB 594, 594-595 (2011) (where Board Agent closed polls early and there was a one-vote margin in the election, a determinative number of voters were potentially disenfranchised; election set aside); *Security '76*, 272 NLRB 201, 201 (1984) (seven undelivered mail ballots tantamount to a failure to provide notice and an adequate opportunity to vote).

Further, in at least one case, the Board has ordered late-received mail ballots counted, where the circumstances showed that the eligible voters reasonably could have expected that their ballots would be timely received by the Region. Thus, in *Queen City Paving Co.*, 243 NLRB 71, 73 (1979), the Board decided that the Region should count one ballot that it received after the closing time for casting ballots, reasoning:

a party's failure to meet a deadline for the filing of some matter may be excused if there is a showing that he mailed the matter at a time when he could reasonably anticipate its timely receipt. Bryan Smith's [the voter] ballot was postmarked 3 days prior to the closing time for casting ballots. It was reasonable for Smith to assume that, in the normal course of the mails, his ballot would be received by the Regional Director prior to the closing date. Therefore, the challenge to the ballot of Bryan Smith is hereby overruled, and we shall direct that it be opened and counted.

Accordingly, where voters can reasonably assume that, in the normal course of the mail, the Region would receive their ballots in sufficient time to be included in the count, such votes should be counted, especially where they may affect the outcome of the election. *Id.*; *see also Classic Valet Parking, Inc.*, 363 NLRB No. 23, slip op. at 2 (2015) (Member Miscimarra, dissenting) (finding that the employer raised a substantial issue warranting review where, in the mail-ballot election, a determinative number of voters' ballots were postmarked 5 days or more before the count, but were not received by the Region until after the ballot count and excluded from the tally); *Premier Utility Services, LLC*, 363 NLRB No. 159 (2016) (Member Miscimarra, dissenting) (finding review of employer's overruled mail-ballot objections appropriate where record showed that 48 ballots were postmarked before the end of the voting period but not received in time to be counted in the tally).

Thus, it is appropriate for the Board to set aside an election where its election standards are not adequately maintained, whether through fault of the Region, or others. In such cases, "the requisite laboratory conditions are not present and the [election] must be conducted over again." *North American Aviation*, 81 NLRB 1046, 1048, n.9 (1949), quoting *Matter of General Shoe Corporation*, 77 NLRB 124, 127 (1948). Additionally, in certain circumstances, it can alternatively be appropriate for the Board to count late-received ballots where voters reasonably anticipated their timely receipt by the Region.

B. The Employer's Objections Warrant a New Election.

1. Four Employees Were Denied an Adequate Opportunity to Vote and Disenfranchised as a Result of the Region's Conduct in the Election (Objections 1-7).

The uncontroverted testimony reflects that at least three out of four eligible voters at issue here (Robert Logan, Paul Kent, and Todd Veney) were denied an adequate opportunity to vote

and disenfranchised because of serious election irregularities caused by Region. Even though the fourth voter (Patrick Ward) did not testify about his voting experience, the record shows that he was possibly disenfranchised by the Region's conduct, particularly when viewed in the context of the testimony concerning the election irregularities.

Logan, Kent, and Veney all testified that they were aware that an election was being held, wanted to vote in the election, and were regularly checking the mail for the ballots but never received them in a timely manner. (Tr. 27-29, 38-39, 195-196). When Logan and Kent failed to receive their ballots as expected, they contacted the Regional Office, as instructed, at the number listed on the Notice of Election to so inform the Region. (Tr. 38-42, 195-197). However, Logan and Kent were unable to do so because the telephone number provided by the Region for this exact purpose was not monitored during the election. (*See* Tr. 55, 195-196, 205-206, 603). In this regard, Logan testified that on November 23 and then again on November 25, he called the Regional Office at the number on the Notice of Election.¹⁴ (Tr. 600-602). On both occasions, the number connected Logan to an automated answering machine, and Logan left two voicemails. In both voicemails, Logan identified himself as an eligible voter, stated that he had not received his ballot, and requested a duplicate one. (Tr. 55, 601). (Tr. 38, 601, R. Exh. 5). Neither of Logan's two voicemails were returned by the Region before the end of the voting period. (Tr. 40, 47).

¹⁴ At the hearing, the Union attempted to discredit Logan's testimony about when he called the Region about his missing ballot with self-serving, selected excerpts of Logan's Verizon phone records. (*See* Tr. 385). Although Logan initially testified that he telephoned the Region on November 21, his Verizon phone records show that he made two telephone calls to the Region on November 23, one for one minute and a second for three minutes. Logan later confirmed that he made the calls on November 23. (Tr. 601, 603). While Logan's initial testimony was in error on the exact date, the substance was accurate. Also, being off on an exact date is certainly understandable as well over one year had passed since the election. The key point is that Logan attempted to reach the Region at the number designated on the Notice of Election to request a new duplicate ballot, at a point in time long enough before the election deadline that it should have been effective, and the Region did not return his phone call. (Tr. 601-603).

After not hearing back from the Region and concerned that he would be deprived of an opportunity to vote (a concern that came to pass), Logan made additional efforts to obtain a ballot. On or about November 26, Logan emailed the Union Representative and NHRA's Vice President of Human Resources to inquire about contacting the Region about his missing ballot. (Tr. 46, 56-58). The Union Representative provided Logan with Board Agent Frank Flores's direct telephone number. (Tr. 39). Logan called Mr. Flores on November 30 and explained to Mr. Flores that he had still not received his ballot and that he needed it sent in order to vote before the election period ended. (Tr. 39, 55-56, 58; R. Exh. 5, 10). Mr. Flores agreed to send Logan a ballot as quickly as possible, but more critically, Mr. Flores revealed that the telephone number listed on the Notice of Election for voters to use to contact the Region regarding the non-receipt of mail ballots was not monitored.¹⁵ (Tr. 55, 602-603). Logan ultimately received his initial ballot on December 5 – some 20 days after the initial mailing date, 12 days after he placed his first telephone call to the Region, and five days after the voting period ended. (Tr. 39). Logan later received a duplicate ballot on December 7 – some 22 days after the initial mailing date and seven days after the end of the voting period.¹⁶ (*Id.*). Given that the voting period had already ended when Logan received the ballots, he did not complete a ballot and mail it in. (*Id.*; R. Exh. 3, p. 20 [Region's Marked-Up Voter List]).

Kent had a similar experience to Logan, both with regard to not receiving his initial ballot in a timely manner and then with regard to the Region's lack of responsiveness overall. (Tr. 195-197). On November 25, Kent called the Regional Office at the number listed on the Notice of

¹⁵ Mr. Flores also stated that the Region was experiencing difficulties overall with mailing the ballots across the country, not solely with Logan's ballot. (Tr. 39).

¹⁶ The Region's records reflect that it mailed Logan a duplicate ballot on November 28. (R. Exh. 3, p. 9).

Election to inform the Region that he had not received a ballot. (*Id.*, R. Exh. 10, p. 7). Kent also emailed the Region to inform it of the same. (Tr. 195). Neither Kent's voicemail nor his email was returned by the Region, and he never directly spoke to the Region about the difficulties he was experiencing with receipt of his ballot. (Tr. 205-206). Kent ultimately received his initial ballot on December 9, and he completed and mailed it in to the Region on December 10. (Tr. 197). The ballot was received by the Region on an unknown date and not counted. (R. Exh. 3, p. 19).

Veney, unlike Logan and Kent, did in fact receive his ballot in time to vote in the election, on November 28, although this was some 13 days after the ballot-distribution date. (Tr. 27-28). In any case, recognizing that November 28 was close in time to the end of voting period, on that same day Veney completed his ballot, placed it in the return envelope provided by the Region and mailed it back to the Region via two-day Priority Mail at his local Post Office. (Tr. 27-28, 30). Veney paid \$5.98 to ensure that his ballot arrived at the Regional Office before the close of the voting period. (Tr. 30, R. Exh 1). Although Veney's ballot was mailed on November 28 and it should have been delivered to the Region no later than December 1 (one day before the count and within the Board's grace period for late-received ballots), it was not stamped "received" by the Region until December 5 and was not counted in the election. (R. Exh. 1; R. Exh. 3, p. 25).

While Ward did not testify, he appears to have experienced similar delays in receiving his ballot from the Region. (*See* R. Exh. 10, p. 5). On November 22, Ward emailed Board Agent Eric Pomianowski, informing him that he had not received a ballot and requesting a duplicate one. (R. Exh. 10, p. 5). The record shows that the Region mailed Ward two duplicate ballots on November 23 and 29, one of which Ward returned. (R. Exh. 3, pp. 8-9). Ward's ballot was

postmarked December 1, marked received by the Region on December 9, and not counted in the election. (R. Exh. 3, p. 25).

Thus, the record demonstrates that, at a minimum, Logan, Kent, Veney, and Ward were all denied an adequate opportunity to vote. The Region's failures in this respect are material, especially with regard to the unmonitored telephone number for the Regional Office, as they set off a chain of events that led two voters at issue, and possibly other ones, to be deprived of an opportunity to vote.¹⁷ Had the Region regularly monitored the telephone number that it provided to voters and timely returned the various messages that it received, Logan and Kent and possibly other voters would have received their duplicate ballots in time to vote. Further, even assuming that the Region had monitored the number or at least timely checked the automated answering machine linked to the telephone number, once the Region became aware of the fact that voters had not received their ballots, it was obligated to respond in a reasonable manner by promptly mailing out duplicate ballots. That was not done here. The Region's records show that it mailed Ward a duplicate ballot on November 23 – one day after he had requested a ballot. However, the Region did not mail Logan a duplicate ballot until November 28, although he requested one on November 23, the same date as Ward. There is no credible reason that the Region could not have mailed Logan a duplicate ballot on that same day, as opposed to waiting until November 28 as the Region did.

¹⁷ The record shows that Logan, Kent, Veney, and Ward were not the only voters who experienced issues in receiving their ballots in a timely manner. The Region's records demonstrate that nine duplicate ballots were mailed between November 9 and 29. (R. Exh. 3). Of course, this figure may not include any eligible voters who may have called the Region at the telephone number provided, but whose calls or requests for duplicate ballots went unanswered. In fact, it could be argued that only the Region was in a position to know the full extent of the balloting problems, and that the Region should have moved, on its own accord, to extend the time for ballots to be returned and counted.

It is important to note that the Region's decision to list a non-monitored telephone number on the official Notice of Election completely contravenes the guidelines set forth in the Board's Casehandling Manual, Part Two Representation Proceedings. Section 11336.2(c) of the Manual recognizes that the Board Agent designated for a mail-ballot election "should be an individual who is readily available in the event voters attempt to contact him/her." Further, Section 11336.4 of the Manual states, in relevant part, that: "[a]ny contacts from prospective voters who report they have not received a kit should be given the action warranted." In this case, it is not clear that the Board Agent was "readily available" because voters' attempts to contact the Region about their ballots went unanswered. Also, it is plain that Logan and Kent's repeated voicemails to the Region about the non-receipt of their ballots were not given the "action warranted" because they were ignored and resulted in Logan and Kent being deprived of their right to vote in the election.

In addition to the telephone issues, the facts suggest that the Region's mail-intake processes failed in this election. The Region's records indicate that Veney's ballot was not timely received even though Veney sent his ballot by Priority Mail with more than enough time so that he could expect his ballot to be timely received and counted – yet it was not. With respect to Veney's ballot specifically, there is no reasonable basis as to why Veney's vote should not count when the evidence plainly shows that he mailed it at a time and in a manner such that he could reasonably anticipate timely receipt by the Region through the normal course of the mail. *See Queen City Paving Co.*, 243 NLRB at 73 (1979). There are many plausible explanations for why Veney's ballot did not arrive on time, but importantly, none of them are due to Veney's own indifference or fault.

The logical and inescapable inference to draw from all of this evidence is that the Region's mail-balloting processes and procedures suffered an unacceptable breakdown.

2. Because the Region's Conduct Denied Voters an Adequate Opportunity to Vote and Disenfranchised A Sufficient Number of Voters to Affect the Outcome of the Election, the Election Should Be Set Aside.

As noted in Section B, *supra*, an election will be set aside if the objecting party shows that the number of voters possibly disenfranchised by an election irregularity is sufficient to affect the election outcome. *Garda CL Atlantic, Inc.*, 356 NLRB at 594. NHRA has carried its burden in this respect and the election here should be overturned. It cannot be disputed that the four employees' votes at issue are sufficient to affect the outcome of the election. The number of eligible voters was 99, 69 ballots were cast, and the electoral margin was one vote in favor of the Union. (P. Exh. 11). Thus, the four votes could alter the outcome here.

Moreover, the Region's conduct in this election not only *possibly* disenfranchised voters, it in fact disenfranchised voters. Logan and Kent especially were denied an adequate opportunity to vote and disenfranchised because they did not receive their ballots in a timely manner from the Region, and then, when they tried to remedy the situation as instructed by the Board's own official document, they were stymied by the Region's failure to provide a proper phone number and overall lack of responsiveness. Even more disturbing, however, is Board Agent Flores's undisputed statement to Logan that the telephone number listed on the Notice of Election was not monitored by the Region during the election. (Tr. 55, 603). Flores's statements and conduct provide an independent basis to overturn the election. Indeed, it is troubling that Flores may have known that the Region's telephone number listed on the official Board document for voters to call to obtain duplicate ballots was not monitored *during the election*, that he expressed this fact to an eligible voter, and that he apparently did not act to correct it. It is proper to draw an adverse

inference because the General Counsel did not call Board Agent Flores to contradict Logan's testimony. Mr. Flores did not deny making this statement, and the General Counsel presented no other witness who disputed Mr. Flores' statement. *See Int'l. Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987); *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1022 (2006). The Employer's subpoena requested a Board Agent to testify as a witness about the procedures used in the election, but the Board denied this request. (*See* R. Exh. 3, pp. 6-7).

This is not a case where voters failed to vote due to indifference. In *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987), the Board stated:

[W]hen a Board election is met with indifference, it must be assumed that the majority of the eligible employees did not wish to participate . . . and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an 'adequate opportunity to participate in the balloting' will the Board decline to issue a certification and direct a second election.

Instead, in this case, the objective evidence shows that the voters did not fail to cast ballots out of apathy. Quite to the contrary, these individuals very much wanted to vote and, as evidence of such desire, they did precisely what the Region's instructions directed them to do. Despite their repeated good-faith efforts, however, the voters' desires were disregarded. These individuals should not be denied their opportunity to vote. Indeed, it is difficult to imagine a circumstance that would do more to disenfranchise voters than for the Region to ignore their efforts to inform the Region that ballots were not received in the first place.

That the election here should be set aside is further buttressed by the fact that the Region's conduct led at least one voter to seriously question the adequacy and fairness of the election and the Board's processes overall. In this respect, Logan testified:

I was a little bit mad, you know, a little upset because I really wanted my vote to count. *And I really wanted to vote. And I need to vote and the*

general thing after that was, I mean, it didn't really matter it seemed like to anyone that I did or didn't vote.

(Tr. 41) (emphasis added). Logan echoed a similar sentiment in a January 2017 email to the Union Representative, stating:

I still care.
I still would have liked to vote . . .
I just don't trust the legal system
Thanks for getting back with me.

(R. Exh. 2) (emphasis added). The Board has the responsibility to maintain high election standards. When after a Board election, an eligible voter testifies that as a result of his voting experience he doesn't "trust the legal system" and that "it didn't really seem to matter to anyone that I did or didn't vote," it seems plain that the Board's high standards were not met and the election should be overturned.

The General Counsel will likely contend that the mail ballots could have been thrown out by individuals having mistaken them for junk mail or can be explained by the "vagaries of the mail." This theory is belied by the testimony of the individual voters themselves and misses the mark of the overriding issue. Logan and Veney testified that they lived at the address provided to the Region during the election period.¹⁸ Logan lives with his wife and daughter, and Logan specifically told his wife who checks the mail at times to look out for the ballot in the mail. (Tr. 50). Logan testified that although he was working production jobs during the election, he was at home and neither he nor his wife ever received a ballot in the mail prior to December 5, five days after the end of the voting period. (Tr. 39, 50-52, 56). Kent lives by himself, and while he was

¹⁸ Based on Kent's testimony, it appears that his address is 769 Markdale Street, as opposed to 769 Markdale Road, which is the address listed on the voter list. The difference between "Street" and "Road" seems inconsequential given that the Postal Service eventually delivered Kent's ballot to his home.

away from home for Thanksgiving from November 25 to December 4, when he returned home on December 4, his ballot had still not arrived. (Tr. 197-198). Any contention by the General Counsel that the reason that Kent did not timely receive his ballot was because he was absent from his home should be rejected because he had still not received any ballot by December 4. (Tr. 196-197).

Veney lives with his wife only and there is no evidence in the record that suggests that either of them could have mistaken the ballot for junk mail. (*See* Tr. 32-33). Also, based on the Union Counsel's questioning of Veney, it appears that he or the General Counsel may argue that Veney's ballot was somehow addressed to the incorrect address for the Regional Office or that Veney's mailing of the ballot via Priority Mail was somehow responsible for it not arriving to the Region on time. Those arguments should be rejected as well. First, the record shows that the Region ultimately received his ballot in the mail, and thus, the envelope had to be addressed to the correct address. (R. Exh. 3, pp. 12-13). Second, there is no good reason for Veney to be unjustifiably disenfranchised from voting in the election because of the manner in which the Region processes or routes its mail. More importantly, all of these arguments miss the mark because the fact of the matter is that the Region, not the United States Postal Service or the voters, either caused or at the least contributed in a material and significant way to the ultimate decision by the Board to treat the ballots as untimely.

The General Counsel may argue that because Nathan Hess, who was not on the voter list, testified that he obtained a ballot by calling the telephone number provided by the Region, this proves that the Region's number was monitored. Hess testified that he called the Region on

November 21 and received a ballot in time to vote ballot in the election.¹⁹ (Tr. 281-282). While superficially appealing, this argument should be rejected because the fact that Hess or any other voter obtained a ballot does not absolve the Region from its duty to ensure that all voters are provided with an adequate opportunity to vote. Hess getting a ballot does not erase the four known individuals who did not have an adequate opportunity to vote. Nor is Hess's claim sufficient to discredit Logan's or Kent's experience or excuse the Region's failure to timely respond to Logan's or Kent's requests for duplicate ballots.

The weight of the evidence and the statement from Board Agent Flores demonstrate that the Region failed to give all voters a fair opportunity to participate in this election. If anything, the fact that the Region appears to have treated Hess differently from Logan and Kent, by sending a ballot to Hess in sufficient to time for him to vote, but not doing the same for Logan or Kent, provides more reason to overturn the election here because it demonstrates inconsistent treatment and that not all voters were given the same opportunity to participate in the election.

The General Counsel may also contend the Board's commitment to providing finality of election results supports dismissing the Employer's objections here, but that argument fails to consider another important Board value – maintaining the integrity of the mail ballot election process. *See Star Baking, supra* (“it is the responsibility of the Board to establish proper procedure for the conduct of its elections” and its failure to send a ballot to an employee who was stationed 45 miles from the polling site necessitated a rerun election even though the employee knew of the election and could have voted in person); *see also Fessler & Bowman, Inc.*, 341 NLRB 932, 933 (2004) (finding that where mail-ballot election procedures are not

¹⁹ Because Hess did not appear on the voter list, the Region challenged his ballot and it was not counted pending the outcome of these proceedings.

followed, the integrity of the election process is called into question). It follows, therefore, that where the integrity of the election is compromised due to conduct by the Region, the Board's preference for finality should yield to allowing voters who reasonably attempted to vote the right to do so.

In sum, together or separately, NHRA's objections identify conduct by the Region that disenfranchised a determinative number of voters, could have affected the results of the election, and compromised the overall fairness and adequacy of the election. Although elections are not lightly set aside, this case represents the extremely unusual one where there is undisputed evidence of Regional Office conduct that caused either ballots to be untimely received or not received at all. Accordingly, the election should be set aside.²⁰ To do otherwise is akin to telling Logan, Kent, Ward, and Veney, "Even though you did nothing wrong and followed the directions given to you to vote, your votes are meaningless and a Union will become your bargaining representative whether you like it or not."

C. Applicable Legal Standards for the Unfair Labor Practice Charges.

To prove a violation of Section 8(a)(3) of the Act, the General Counsel must first establish a *prima facie* case of discrimination by showing that an employee's protected activity was a motivating factor for the employer's adverse action. *Wright Line*, 251 NLRB 1083, 1088-89 (1980), *enf'd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Yellow Trans., Inc.*, 343 NLRB 43, 47 (2004). If the General Counsel makes out a *prima facie* case, an employer may avoid a finding that it violated Section 8(a)(3) by demonstrating that it would have taken the

²⁰ As an alternative remedy, NHRA requests that the late-received ballots of Veney, Kent and Ward be opened and counted and a new tally run. However, given that Logan did not submit any ballot whatsoever, the more appropriate remedy is to set aside the election to ensure Logan is not disenfranchised.

same action in the absence of the protected activity. *See, e.g., Wright Line*, 251 NLRB at 1089.

If, however, the evidence establishes that the reasons given for the employer's action are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons. *See Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

The Board's well-settled test for determining a Section 8(a)(1) violation is an objective one:

[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

American Freightways Co., 124 NLRB 146, 147 (1959). *See also Miami Systems Corp.*, 320 NLRB 71, n. 4 (1995), *enfd in relevant part sub nom.*, 111 F.3d 1284 (6th Cir. 1997) ("The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . ."). The General Counsel bears the ultimate burden of proving under this objective standard, interference, restraint or coercion in violation of the Act. *See Nations Rent, Inc.*, 342 NLRB 179, 180 (2004) ("The General Counsel has the burden of proving every element of a claimed violated of the Act.").

D. The General Counsel Failed to Show That NHRA's Termination of Nathan Hess Violated Section 8(a)(3) and (1) of the Act.

The General Counsel failed to establish even a *prima facie* case of discrimination. There is no evidence that the sole person who made the decision to terminate Hess – Executive Producer Ken Adelson – was aware of Hess's union activities, and the record is devoid of animus. Even assuming the General Counsel could establish those elements, the overwhelming evidence clearly shows that Hess was terminated for a legitimate, non-discriminatory reason, namely because he failed to have four video clips – one of which was for NHRA's largest

corporate sponsor, Mello Yello – in place and ready to air during NHRA’s premiere show of the year. While it is undisputed that Hess was terminated, the General Counsel cannot point to any evidence (nor was any introduced) showing that any union activity was a substantial or motivating factor in the termination decision. Indeed, there is a complete dearth of evidence to support the inference that Hess’s termination was because of any union or other protected activity, and the record reflects that NHRA would have fired Hess regardless of any such activity.

1. The General Counsel Failed to Establish a *Prima Facie* Case of Discrimination.

To establish a *prima facie* case, the General Counsel must show by a preponderance of the evidence that: (1) Hess engaged in protected activity under the Act, (2) NHRA knew of this activity, (3) NHRA harbored union animus, and (4) a motivational link exists between NHRA’s animus and the termination. *See Wright Line*, 251 NLRB 1083, 1088-89 (1980), *enf’d*. 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *Yellow Trans., Inc.*, 343 NLRB 43, 47 (2004). The General Counsel has failed to make the requisite showings in this case.

a. The General Counsel Failed to Show that NHRA’s Decisionmaker Had Knowledge of Hess’s Union Activity.

Initially, the General Counsel’s *prima facie* case must fail because she failed to show that Adelson was aware of Hess’s alleged union activity prior to his termination. It is well settled that an employer cannot be unlawfully motivated by union activity where it has no such knowledge of that activity. *See, e.g., Cardinal Hayes Home for Children*, 315 NLRB 583, 588 (1994) (noting that the General Counsel failed to establish a *prima facie* case because, in part, the decisionmaker had no knowledge of the alleged discriminatee’s union activity); *Diamond Ginger Ale, Inc.*, 125 NLRB 1173, 1177 (1959) (“Essential to such a showing [of an 8(a)(3) violation . . .

is the [e]mployer's knowledge of the fact that his employee was a member of the Union or was actively engaged in its behalf, or both. For it would defy logic to say that an employer could discriminate against his employee because of union activity when the employer never knew of the employee's union membership or activity."); *Volt Info. Sciences*, 274 NLRB 308, 310 (1985) ("The determination of the validity of the charges made against the [employer] depends, among other things, on the findings made respecting the [employer's] knowledge of the employees' union membership, support, or activities.").

Here, Hess's sole claims to union activities are that he signed a union authorization card on August 6, attended several union meetings between August and early September, and talked to other non-supervisory employees about the union during the same period of time. (Tr. 258-259). There is no record evidence that prior to August 6, Hess engaged in any union activity that could have motivated NHRA's termination decision. More significantly, the General Counsel presented no evidence that at any point prior to Hess's termination, Adelson was specifically aware of Hess's union activity or that Hess had signed a union authorization card. In this regard, Adelson first learned of any union activity on Sunday, September 4 during the weekend of the Indianapolis race, when Creative Director Brian Stoll told Adelson that Stoll had overheard "something about a union discussion" at the production employees' hotel. (Tr. 108-109, 536). During this conversation, Stoll did not identify any employees who were present at or who had participated in the union discussion. (*Id.*) This is credible as it later became apparent that Stoll actually supported the union and invited multiple employees to the various union meetings where union authorization cards were signed, making it unlikely that he would readily reveal to Adelson or any other member of management the identities of employees seeking to unionize. (See Tr. 322-323, 331, 377-378, 431). Further, there is no evidence showing that Technology

Executive Michael Rokosa and Producer Pete Skorich, with whom the termination was discussed, knew about Hess's union activities prior to his termination. (*See* Tr. 536, 639). Rokosa spoke to Adelson about the union activity that had been relayed by Stoll, but only in general terms.²¹ (Tr. 639-640).

While Hess testified that he attended two union meetings held during the weekend of the Indianapolis race and participated in other union meetings prior to that point, again, there is no evidence that Adelson, Rokosa or Skorich knew this when Adelson decided to terminate Hess. The fact that Hess participated in the meetings before his termination in mid-September 2016 alone cannot establish or even support the inference that NHRA knew of Hess's specific involvement with the union. To make that inference, something more is required, such as direct or circumstantial evidence linking Hess's union activity to decisionmaker Adelson or some other member of management involved in the termination decision. No such evidence exists here. At best, the record reflects that Adelson and Rokosa were generally aware of the union's emergent organizing campaign prior to Hess's termination, but the record is devoid of evidence connecting that general knowledge to Hess, which is fatal to the Section 8(a)(3) claim.

Any attempt by the General Counsel to claim that NHRA Director Jim Sobczak had knowledge of Hess's union activity and such knowledge should somehow be attributed to NHRA is unsupported by the facts. Hess merely stated that Sobczak was sitting at a public hotel bar adjacent to the room where the union decided to hold its meeting. Any suggestion that Sobczak's

²¹ Rokosa recalled speaking to Adelson about the news of the union activity on or around Saturday, September 3, while Adelson recalled speaking to Rokosa on Sunday, September 4. (Tr. 536-537, 638-640). Suffice it to say, that Adelson and Rokosa learned generally about the union activity between Friday, September 2 and Sunday, September 4. The confusion likely stems from the fact that most NHRA racing events run from Thursday through Sunday, while the Indianapolis race, the longest of the year, takes place over Labor Day weekend and lasts from Wednesday to Monday.

presence at a *public* hotel bar adjacent to the meeting room where the union meeting was held, and that Sobczak might have observed Hess attending a meeting, is too speculative to be credited. In addition, Sobczak was not involved in the termination decision. Further, there is no evidence that Sobczek knew, or if he did know, shared, anything regarding Hess's union activity.

Given the dearth of evidence linking Hess's union activities to the decisionmaker here, the General Counsel may contend that Hess engaged in other protected concerted activities apart from the union of which NHRA had knowledge. Beginning in mid-February, employees complained to Skorich and Rokosa about the quality and frequency of the meals that NHRA provided to the crew at the events, raised concerns about what they perceived as safety issues, and generally complained about the inevitable changes, including creative differences, that resulted from NHRA taking production in-house compared to how NHRA television programs were produced by ESPN and ESPN's production company. To the extent there is evidence of various complaints, its significance is remote. The record does not demonstrate that Hess raised complaints frequently. Further, the record demonstrates that complaints were made as early as the first race of the year, some seven months prior to Hess's termination, making them too temporally distant to be a credible factor in the termination decision made after Hess's extremely poor performance at the Indianapolis race. Finally, there is no evidence that NHRA retaliated against or terminated other employees who complained about food, safety or other similar issues. Quite the opposite, NHRA worked with the employees to resolve them.

In sum, there is simply no record evidence of specific knowledge of Hess's union or protected activities sufficient to establish the General Counsel's *prima facie* case. *See Cardinal Hayes Home for Children*, 315 NLRB at 588.

b. The General Counsel Failed to Show that Hess's Termination was Motivated by Union Animus.

The General Counsel also cannot satisfy its *prima facie* case because it has not shown that Adelson or any other supervisor harbored any union animus against Hess for engaging in protected activities. The General Counsel has the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action, and it cannot carry its burden in this respect. *Wright Line*, 251 NLRB at 1089; *PHC-Elko, Inc.*, 347 NLRB 1425, 1426-27 (2006). Apart from direct evidence of animus, the Board has typically considered factors, including (1) suspicious timing; (2) false reasons given in defense; (3) failure to adequately investigate alleged misconduct; (4) departures from past practices or disparate treatment of the discharged employee; (5) tolerance of behavior for which the employee was fired; and (6) background evidence coupled with adverse action taken against union supporters. *Auto Nation, Inc.*, 360 NLRB No. 141, slip op. at 11 (2014); *Tim Foley Plumbing Service, Inc.*, 337 NLRB 328, 329 (2001) (background evidence coupled with adverse action taken against union supporters is an indicator of union animus). Examining the record evidence overall and applying these factors to this case, it is apparent that NHRA harbored no union animus.

i. There is Insufficient Proof of Animus Overall.

As an initial matter, the record is devoid of probative evidence that NHRA harbored union animus or hostility toward Hess's union activity at the time of his termination or prior to it. Significantly, the two allegations of Section 8(a)(1) violations – the primary means by which the General Counsel typically seeks to establish animus – postdate Hess's termination. Thus, to the extent that the General Counsel attempts to show general union animus by way of these allegations, such evidence should be given little or no weight. Moreover, the evidence fails to

show and Hess never testified that any decisionmaker or other NHRA supervisor made any statements or comments toward Hess for his union activity that might show animus. Absent some specific evidence of animus relating to Hess's union activity, there is no basis on which to find that such animus existed.

ii. Timing of NHRA's Decision to Terminate Hess Was Not Suspicious.

The General Counsel will likely attempt to show animus by claiming that NHRA terminated Hess only after it had learned of the general union activity at the Indianapolis race. That argument shows a mere coincidence and does not factor in Hess's concurrent extremely poor performance. Mere coincidental timing between an employee's alleged protected activity and the decision to terminate is insufficient to infer anti-union motivation. *See e.g., NEPTCO, Inc.*, 346 NLRB 18, 20 (2005) ("Coincidence in time between union activity and discharge or discipline is one factor the Board may consider . . . [b]ut mere coincidence is not sufficient evidence of [union] animus.") (quoting *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-18 (7th Cir. 1992)). Here, Hess's failure to have four video clips in place and ready to air in the middle of a live telecast on network television of one of NHRA's most important races of the year was the cause for his discharge. Moreover, it is difficult for the General Counsel to use the timing to argue animus when there is no evidence showing that Adelson knew of Hess's union activity prior to his termination. General knowledge of union meetings does not prove animus toward Hess's union activity.

The General Counsel may argue that the timing of Hess's termination is suspicious because Hess had just recently received a \$2.50 per hour pay raise some 13 days prior to discharge, potentially indicating that NHRA was satisfied with Hess's performance. However, this argument should be rejected because the significance of the pay raise is immaterial. First,

Hess was given a pay raise on September 1, some four days before Hess's critical failure to air four clips at the important Indianapolis race. (Tr. 227). Second, the evidence demonstrates that the purpose of the raise was not to reward Hess for praiseworthy performance, but instead, to fulfill a promise that Adelson had made at the time that Hess was hired to raise his pay as time went on. (Tr. 526, GC Exh. 20). Third, Hess was not given the full pay increase he had asked for. (See Tr. 309-310). He had originally sought a raise from \$50 to \$55 per hour but was only granted a slight raise from \$50 to \$52.50 per hour. (*Id.*)

In sum, any correlation between the date of Hess's termination and his alleged union activity is coincidental, not suspicious.

iii. NHRA Did Not Give a False Reason for Hess's Termination.

The General Counsel failed to provide credible evidence, direct or circumstantial, that NHRA's reason for Hess's termination is false, *i.e.*, that Hess did not in fact perform extremely poorly at the Indianapolis race. Hess was legitimately terminated because he failed to have four video clips in place and ready to air during a racing event being broadcast live on network television. The General Counsel presented no evidence that Hess in fact aired the clips on September 5; that Hess was not the person responsible for ensuring that the clips aired; or that Hess was unjustifiably blamed for another employee's error. Indeed, Hess testified that he was aware that it was his responsibility to ensure that scheduled video clips were in place and ready to air during the telecasts. (See Tr. 302, 313). Hess also did not dispute the fact that the clips did not air. (See Tr. 301-302). Hess further acknowledged that it was his practice to remain about "one page and a half ahead" on the rundown chart to ensure that all of the video clips required for the show were available, in place, and ready to air at the appropriate time in the show, and yet

neither Adelson nor Rokosa stated that they knew about the purported problems with the four video clips or Xfile 3 device prior to the time at which the clips had to air. (Tr. 225, 647-648).

Nevertheless, based on the General Counsel's questioning of certain witnesses, it appears that she may contend that the termination is somehow unjustified under the circumstances or that NHRA should have imposed a less harsh penalty, given that the Xfile 3 device malfunction was allegedly to blame for the clips not airing.²² Blaming the device does not excuse Hess's poor performance.

To begin, all employees hired by NHRA are hired as "at-will" employees and are so informed at the outset of their employment. (*See* GC Exhs. 19, 20). But, more significantly, whether or not the General Counsel, the Union, or Hess agree with NHRA's decision to terminate Hess for his conduct, the Board recognizes that "[a]n employer has the right to determine when discipline is warranted and in what form. 'It is well established that '[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline.'" *Cast-Matic Corp.*, 350 NLRB 1349, 1358 (2007) (citations omitted); *Framan Mech. Inc.*, 343 NLRB 408, 411-12 (2004) ("[I]t is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful."). Indeed, the Board has "emphasize[d] [that] at the outset . . .

²² To bolster this argument, the General Counsel introduced an article published by NHRA on its website reporting that its television broadcast operation won three "Telly Awards," an award that honors television programs, for segments aired during the Indianapolis race. The fact that NHRA won these awards does not, as the General Counsel suggests, show that the reason for Hess's termination was false or that Hess's performance as an employee was exemplary, or was the basis for the awards. There is no correlation between this award and Hess's performance on the day of the Indianapolis race. The submissions submitted to the Telly Awards were edits specifically for their consideration and not an internal evaluation of the success or failure of the live Indianapolis broadcast. (Tr. 585). Obviously the clips that Hess failed to find were not a part of the submission in any case. (*Id.*).

“the crucial factor is not whether the business reason cited by [the employer was] good or bad.” *Id.* at 411-12 (citations omitted). “It is not the province of the Board to second-guess legitimate business judgments.” *M.A.N. Truck & Bus Corp.*, 272 NLRB 1279, 1293 (1984); *see Mini-Indus., Inc.*, 255 NLRB 995, 1004 n.30 (1981).

Further, where an employer asserts, as NHRA has done here, that employee misconduct was the reason for the discharge, an employer “does not need to prove that the employee *actually* committed the alleged offense. It must show, however, that it had a *reasonable belief* the employee committed the offense, and that the employer acted on that belief in taking the adverse action against the employee.” *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) (emphasis in original). Here, the evidence shows that NHRA had, at a minimum, a justifiable and reasonable belief that Hess committed the offense, and it acted on that belief in terminating him. Adelson determined that Hess made a critical failure as a tape producer and lawfully terminated him as a result. Adelson and Rokosa both testified that in each of their over 35 years of experience in the television production industry, they had never witnessed a tape producer who failed to have four video clips ready to air during a live telecast without sufficient advance warning like Hess did on September 5. (Tr. 554, 654-656). Adelson further stated that based on Hess’s repeated failures on September 5, it appeared that his actions were “intentional” or at least demonstrated that Hess lacked the skill or ability to perform a critical job function. (Tr. 554). It is not within the General Counsel’s purview to second guess whether the circumstances of Hess’s failures warrant some sort of lesser punishment.

In addition, the General Counsel will likely contend that the real reason for Hess’s discharge was union animus, which is allegedly supported by the fact that Hess was not to blame for the clips failing to air, but rather, the Xfile 3 device was, and NHRA used this device

malfunction as a guise to terminate Hess in retaliation for his union activity. For several reasons, this argument deserves short shrift.

First, there is no evidence that at the time of termination, NHRA knew of Hess's union activity, which makes it difficult to credit any contention that it would manufacture a false reason to terminate him for his union activity in the first place.

Second, NHRA had reason to believe that the Xfile 3 device did not in fact malfunction as Hess claimed it did. After the September 5 incident, that same day, Associate Director Katie Stoll informed Rokosa that the Mello Yello clip was indeed available on NHRA's server at the time of broadcast. Rokosa communicated this fact to Adelson prior to the termination. (Tr. 652-653).

NHRA was more than justified in its belief that it was because of Hess, not the Xfile 3 device, that the clips did not air. Rokosa further testified that following this incident, NHRA experienced no issues with the Xfile 3 device, and it was not repaired or replaced, suggesting that the device was working properly at the time of the Indianapolis race. (Tr. 661). Further corroborating this fact is Director of Broadcasting Operations Rob Hedrick, who testified that based on the reel of video files that Hess sent back to NHRA after the end of the Indianapolis race, *i.e.*, the "melt," it appeared that the Xfile 3 device was functioning on the day of the race because in order for files to exist in the melt, they had to have been processed using the Xfile 3 device. (Tr. 707). And, based on the file directory of the melt, the "PitFit WORKOU-045-4-SEP-2016" clip, one of the four video clips that Hess had claimed was not available due to a malfunction of the Xfile 3 device, was in fact available for air as it existed in the correct format among other video files that had aired on the day of the race. (Tr. 701, 703-705, 710, R. Exhs. 4, 9). Notably, this clip is a different clip than the Del Worsham's Mello Yello Feature clip that

Rokosa independently learned was also available for air. (See Tr. 679-680, 704, R. Exhs. 4, 9). Accordingly, at least two of the four video clips that Hess claimed were not available due to a device error during the show, in fact appear to have been available on the day of the race or at least accessible to Hess on NHRA's servers. The General Counsel did not rebut this evidence.

Third and critically, even assuming that the Xfile 3 device failed as Hess claimed it did, there was sufficient time for Hess to resolve the problem before the program began airing at 1:00 p.m., or at a minimum, before the time set on the rundown chart for the clips to air. If in fact there had been a problem, Hess did not act to promptly address it and correct it. Hess stated that he did not discover that the Xfile 3 device was not functioning properly until "shortly after 10:00 a.m.," which is when Hess allegedly told Adelson, Rokosa, and Skorich about the problem. (Tr. 268). Hess provided no detailed explanation for what transpired between 10:00 a.m. and the start of the show at 1:00 p.m., or why the clips could not be repaired *during the three hours before the start of the show*.

Hess further claimed that during the show, it was his practice to stay about "one page and a half ahead" on the rundown chart to ensure that all of the video clips required for the show were available, in place, and ready to air at the appropriate time. (Tr. 225). However, Hess apparently was not ahead on September 5, since neither Adelson nor Rokosa was informed of the problem with clips in advance of when they had to air. (See Tr. 567-568, 647). Indeed, Hedrick estimated that had an employee reported such a problem to the appropriate person, it could have been resolved in about 10 to 15 minutes, using another program called Adobe Media Encoder. (Tr. 695, 711). And, contrary to Hess's testimony, Adelson and Rokosa both denied that Hess *ever* informed them of the problem with the Xfile 3 device on the morning of the race. (See Tr. 567-568, 647). The more plausible inference to make from these facts is that even if a problem

with the Xfile 3 device existed (which NHRA disputes), Hess was so careless that he did not discover it until it was too late to repair or resolve it through other means.

To the extent the General Counsel attempts to rely on F&F Productions Engineer Billy West's technical report to corroborate Hess's claim that the Xfile 3 device was not working on September 5, such attempts should be rejected. West did not testify. Therefore, there is no testimony about when, how or why he wrote the report. The actual report is not dated, raising the question of whether West generated it at or near the time of the race or several days thereafter. (GC Exh. 25, p. 19). Indeed, West regularly failed to submit his reports in a timely fashion and was later released from his position for job performance issues. (Tr. 369-370, 372-373). Further, Marc Orgera ("Orgera"), the Vice President of F&F Productions, testified that from West's report there is no way to determine that West actually inspected the Xfile 3 device to determine for himself whether the issue as stated actually occurred, as opposed to recording the information after learning it secondhand from someone else. (Tr. 370). Also, Orgera stated that the Xfile 3 device worked properly for the remainder of the 2016 racing season and was never replaced, plus there are no other technical reports from subsequent races in 2016 indicating that the Xfile 3 device was unable to transcode video files from one file format to another, undermining the notion that the device was unstable and prone to failing. (Tr. 369-371; *see also* Tr. 647). Finally, the fact that other technical reports reveal that a licensing code for the Xfile 3 was close to expiring or that NHRA had previously used a "demo" Xfile device have nothing to do with any purported malfunction of the device and there was no evidence to suggest such a connection. Any reliance by the General Counsel on the September 5 technical report is too speculative, particularly where the General Counsel failed to call the person who wrote it to explain the circumstances prompting its creation or its meaning.

Simply put, Hess's conduct on September 5 raises the distinct possibility that his actions may have been intentional or at best demonstrate that he lacked the requisite skills to perform his job successfully. (See Tr. 554, 656). Indeed, the record confirms that Adelson began expressing concerns about Hess's performance as early as March 23 – almost five months prior to Hess attending his first union meeting on August 6. On March 23, Adelson wrote to Skorich via email, stating “*I’m still not thrilled with his overall performance and not sure if he’s out [sic] guy for the long term.*” (R. Exh. 8, p. 1) (emphasis added). NHRA terminated Hess for a legitimate reason.

iv. NHRA Adequately Investigated Hess's Failure to Have Video Clips Ready to Air.

The General Counsel cannot show animus by claiming that Hess was terminated without an appropriate investigation into the incident. After Hess failed to air four clips on September 5, Adelson and Rokosa investigated what occurred. Adelson determined that Hess in fact failed to air the video clips, and as such, should be terminated.²³ (Tr. 553-557). On or about September 7

²³ At the hearing, the General Counsel argued that the rundown chart showing the names of the four clips that did not air fell within the scope of documents contemplated by her subpoena, and inasmuch as NHRA did not produce it pursuant to the subpoena, NHRA should be precluded from relying on it. The argument is premised on two overbroad subpoena requests that sought from NHRA *all* documents related to Hess's termination and *all* documents showing “correspondence between NHRA and Mello Yello Coca Cola, whose materials did not air.” (GC Exh. 38, par. 5 and 7). To begin, Adelson did not rely on the document to terminate Hess. (Tr. 566-567). Both Adelson and Rokosa were present at the Indianapolis race, overseeing the broadcast, and thus, they independently learned in the course of their duties that Hess did not have the clips in place and ready to air. (Tr. 566-567, 647). Rokosa was also physically present in the production trailer when the key Mello Yello clip did not air. (Tr. 647). There is no dispute that video clips did not air. The rundown chart merely corroborates the names of the particular clips that Hess did not air and the time at which they were scheduled to be aired. Its admission or non-admission does not change the fact that Hess failed to air the four clips and that Adelson lawfully terminated him as a result. Further, the rundown chart is not responsive to the subpoena requests because it is not “correspondence between and Mello Yello Coca Cola” and was not relied upon for the termination. Instead, it is an internal document created by NHRA showing a segment-by-segment breakdown of the Indianapolis race broadcast and used by certain

or 8, Adelson spoke to Rokosa and Skorich about Hess's failure to air the clips. (Tr. 554-555). All three discussed the negative impact that the failure had on the quality of the Indianapolis show. (See Tr. 554-556, 652-653). Adelson discussed feeling "distraught" because the clips did not air, and Rokosa and Skorich expressed similar concerns. (Tr. 554-557). During this conversation, Rokosa also informed Adelson that Rokosa had checked the Del Worsham's Mello Yello Feature and found that it was in fact available on NHRA's server at the time of broadcast and ready to air. (Tr. 557, 652-653, 677-681). Rokosa had learned that the clip was available to air from NHRA Associate Director Katie Stoll, who had informed Rokosa on September 5 that the Del Worsham's Mello Yello Feature was on NHRA's server. (Tr. 557, 677-681). Reviewing the information and knowing what happened in the show, Adelson determined that Hess had failed in a critical respect and decided to terminate him.

v. NHRA Did Not Treat Hess Differently From Other Employees and There Is No Evidence That NHRA Has Tolerated Similar Behavior From Other Employees.

The General Counsel introduced no evidence suggesting disparate treatment, or that NHRA has tolerated similar behavior from other employees. Further, the record supports the notion that had another employee committed the same acts as Hess he or she would have been terminated as well. (See Tr. 554 ("And in 35 years of doing what I do, this had never happened in this way, in my experience. This is just completely, out of any – out of any norm. And it just, it just begged of incompetence . . . It was just so out of line with anything and other tapes [*i.e.*,

employees during the broadcast of the show itself. (Tr. 645). Even assuming, *arguendo*, that the document falls within the scope of the subpoena, the General Counsel has not shown any prejudice by its admission. The General Counsel had opportunity to examine NHRA's witnesses pursuant to Rule 611(c) of the Federal Rules of Civil Procedure about the document. There is also no evidence that NHRA intentionally withheld this document. Had NHRA believed it to be responsive, it would have been produced.

clips] had throughout the day.” [Adelson]), 654 (Rokosa testifying that in his 38 years of experience he has not witnessed an employee failing to call up so many video clips during a live television show)). This factor cannot be used to show animus.

vi. NHRA’s Decision Not to Rehire Josh Piner Is Not Probative Evidence of Animus and Should Carry No Weight.

The General Counsel apparently intends to rely on Piner’s alleged (and unproven) unlawful separation as evidence of general union animus and to show animus in its Section 8(a)(3) violation concerning Hess. (*See* Tr. 444:3-445:9). The General Counsel’s attempts to create an inference of union animus by referring to Piner’s separation should be given no weight.

The parties settled claims by Piner that his employment allegedly ended for unlawful reasons. The Settlement Agreement contained a non-admission clause, whereby NHRA did not admit to any violation of the National Labor Relations Act. Over NHRA’s objection, limited testimony was admitted from Piner regarding the reasons for his separation as potentially probative of “general evidence of animus.” (Tr. 445). While in certain circumstances it may be appropriate for the General Counsel to rely on the adverse action against other union supporters, this is not one of them.

First, the claims surrounding the legality of Piner’s separation were in fact settled. The Board has uniformly held that settlement agreements with non-admission provisions, and consent decrees arising therefrom, have no probative value in establishing that violations of the Act have occurred and may not be relied on to establish either union animus or a “proclivity” to violate the Act. *Southwest Chevrolet Corp.*, 194 NLRB 975 (1972); *see also Tri-State Building & Construction Trades Council*, 257 NLRB 295, 297 (1981) (“settlement agreements . . . have no probative value in establishing that violations of the Act have occurred and, hence, they may not be relied upon to establish a ‘proclivity’ to violate the Act.”) (emphasis added) (internal citations

omitted)). Thus, to the extent the General Counsel attempts to show union animus by the way of prior unproven unlawful termination allegations, this Judge should refuse to make any such findings. Second, even assuming, *arguendo*, such evidence could be probative, there is no record evidence that Piner's separation or NHRA's motivations behind it are linked to Hess.

vii. NHRA's Lawful Opposition to the Union's Organizing Campaign is Not Probative Evidence of Animus and Should Carry No Weight.

Section 8(c) of the Act states that "expressing any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). It is well-settled that opposing unionization, without more, or simply stating a personal belief that employees are better off without a union does not establish unlawful animus. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"); *Birmingham Chrysler Plymouth Jeep Eagle, Inc.*, 326 NLRB 1175, 1176 (1998) ("[O]pposition to unionization is insufficient in itself to establish animus."). While the Board has also held that an employer's opposition to unionization could be considered "background evidence" of animus, *see Tim Foley Plumbing*, 337 NLRB 328, 329 n.5 (2002), NHRA's lawful campaign activity by itself is not probative of union animus and should carry no weight in assessing the lawfulness of Hess's specific termination. An inference of unlawful motivation cannot be based on generalized statements about union organizing absent some evidence linking that animus to the adverse employment action. More critically, all of the alleged unlawful conduct by management

and campaign materials introduced by the General Counsel occurred or were issued *after* Hess's termination, and thus, they do not show animus for his termination.

c. There Is No Motivational Link Between Hess's Alleged Protected Activity and NHRA's Termination of His Employment.

The record directly contradicts an inference that union animus is linked to the decision to terminate Hess, since Hess was terminated for his poor work performance at the Indianapolis race. The General Counsel thus cannot make out a *prima facie* case with respect to Hess's termination because she cannot satisfy the fourth prong. *See e.g., United Cloth Co.*, 278 NLRB 583, 588-89 (General Counsel must provide a link under *Wright Line*; where there is no link between the adverse employment action and the protected activity, the General Counsel fails to establish a violation of the Act). Because the General Counsel could not establish a *prima facie* case, the Section 8(a)(3) allegation related to Hess's termination should be dismissed.

2. NHRA Would Have Terminated Hess Regardless of Any Union Activity.

Even if the General Counsel could demonstrate a *prima facie* case, NHRA has shown that Hess would have and should have been terminated notwithstanding any alleged protected activity. *Wright Line*, 251 NLRB at 1086-87. In making this determination, the Board should "not engage in any analysis as to whether the disciplinary decision taken by the Company was 'wise or well supported.'" *West Limited Corp.*, 330 NLRB 527, 528 n.5 (2000). Nevertheless, NHRA has shown ample justification for Hess's termination.

The fact that the four video clips did not air on September 5 was not an inconsequential or excusable error. Both Adelson and Rokosa testified that in each of their many years of experience in the television production industry, they had never witnessed a tape producer who failed to have four video clips ready to air during a live telecast without sufficient advance warning like Hess did on September 5. Adelson also expressed that Hess's successive failures to

air the four video clips from 1:45 p.m. to 2:55 p.m. during a single race demonstrated a genuine inability to perform the Tape Producer job, and given the nature and extent of the failures, suggested that they may have been “intentional.” (Tr. 554). Echoing a similar sentiment, Rokosa testified that there was “panic” in the production room when the important Mello Yello clip did not air, and Hess’s actions were “unprofessional.” (Tr. 647, 656). The Mello Yello clip was created especially for the Indianapolis network broadcast, and Hess’s failure to ensure that it aired at all was a critical and termination-worthy error. (Tr. 551-554). Hess’s failure to air the clips had ramifications outside the actual broadcast as well. Mello Yello complained to NHRA directly about its clip not airing, which undoubtedly caused unnecessary embarrassment for NHRA. (Tr. 553-554). Simply put, Hess failed to perform a critical job function, and Adelson made the reasonable business decision to terminate him as a result.

Even assuming that the General Counsel could show that Hess’s performance was not the real reason for his discharge, that alone cannot sustain her burden in this case. Under *Wright Line*, the General Counsel must show that animus against Hess’s union activity was a motivating factor in his discharge. To the extent that she relies on pretext to make that showing, the General Counsel must prove not merely that NHRA’s stated reason for discharging Hess was false, or not in fact relied upon, but that the *real* reason was animus against Hess’s union activity. The record evidence in this case rules out such a finding.

3. Hess Was Not A Credible Witness.

Viewed as a whole, Hess’s version of events regarding what transpired during the Indianapolis race is not credible. To begin, Hess could not recall details about which or how many clips exactly did not air during the broadcast, or other details surrounding the incident at

the Indianapolis race that one would expect someone to recall under these circumstances.

Regarding the incident, Hess testified as follows:

Q: You would agree, would you not, that on the 5th of September, the Mello Yello clip that [was] supposed to be played live did not play?

A: I'm not sure.

Q: You're not sure. It's your job to get those clips up to be played live, is it not?

A: If everything's working correctly, yes.

...

Q: When did you first learn they weren't working correctly?

A: Shortly after 10 a.m.

...

Q: The Mello Yello clip, that you were unable to pull up at the time it was needed, when did you first learn it was not available to be pulled up?

A: I'm not sure on the time frame.

...

Q: Was it one or more clips?

A: There was more than one . . . That would not, they we [sic] didn't have. But I don't know exactly how many.

(Tr. 301-302).

Further, Hess's testimony that on September 5 shortly after 10:00 a.m., he informed Adelson, Rokosa, and Skorich that the Xfile 3 device was not functioning, and they responded in a manner suggesting that "it didn't seem like a big concern to them" is simply not believable.

(Tr. 301). Adelson and Rokosa both testified about the seriousness of what occurred, and it strains credulity to suggest that Adelson, Rokosa, and Skorich would have stood idly by from 10:00 a.m., when Hess allegedly informed them of the problem with the Xfile 3 device, to 1:00 p.m., when the show began to air, and not attempt to fix the problem. (*See* Tr. 684 ("I was never . . . made aware that the XFile was that day in trouble. And had I been made aware of it, I would've been back there until such time that this was resolved. . . [Rokosa])). Hess testified further that he remained about "one page and a half ahead" on the rundown chart to ensure that

all of the video clips required for the show were available, in place, and ready to air at the appropriate time. (Tr. 225). It just does not add up that upon learning of the malfunction of a necessary piece of computer software *three hours before* a live, broadcast network show was scheduled to begin, for one of the most important races of the entire 2016 season, the executives would essentially do nothing for three hours and would react in a manner suggesting that it was of no concern to them. Moreover, if Hess stayed at least a page and a half ahead of the entries on the rundown chart and possessed the attributes of a successful tape producer as he claims he did, there is no credible explanation for why Hess did not warn the producer that Hess did not have an upcoming clip during the show, allowing the producer to react in a manner that did not produce panic in the production trailer. (See Tr. 647).

Unlike Hess, NHRA's witnesses are more credible about the incident leading to Hess's termination. The serious failure on September 5 is undisputed, even by Hess. The General Counsel can point to no proof that any alleged union activity by Hess factored into Adelson's decision to terminate Hess. Hess was terminated for his poor performance. The Section 8(a)(3) discharge allegation should be dismissed.

E. The General Counsel Failed to Show that Marleen Gurrola Unlawfully Solicited Grievances, Created an Impression of Surveillance, or Threatened Employees With Unspecified Reprisals.

1. Marleen Gurrola Did Not Unlawfully Solicit Complaints or Grievances, or Imply that NHRA Would Remedy Those Grievances.

In paragraph 9 of the Complaint, the General Counsel alleges that at a meeting held with employees around September 16, Vice President of Human Resources, Marleen Gurrola

unlawfully solicited grievances and implied that NHRA would fix them to discourage union support. (GC Exh. 1(q) ¶ 9(a)).²⁴

“[S]olicitation of grievances by an employer . . . violates the Act when the employer promises to remedy those grievances.” *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004) (citing *Uarco Inc.*, 216 NLRB 1, 2 (1974)). “The essence of a solicitation of grievances/implied promise of benefit violation is the promise of remedying the grievances, not the mere solicitation.” *Airport 2000 Concessions, LLC*, 346 NLRB 958, 960 (2006). Board law is absolutely clear that “permitting questions is not soliciting grievances.” *Garwood, Inc.*, 339 NLRB 1137, 1139 (2003) (reversing judge and finding no solicitation of grievances when respondent merely permitted employees to ask questions at an informational meeting). Accordingly, merely asking whether employees have any questions or concerns does not constitute an implied promise to remedy grievances or an attempt to blame the Union for concerns raised. Further, where an employer can show a past practice of soliciting employees’ grievances, the employer may continue such a practice during an organizational campaign without an inference being drawn that the solicitations are an implicit promise to remedy the grievances. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (citing *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003)).

Here, Gurrola’s speech was lawful and consistent with her decades-long practice of seeking employee input. In her statement, Gurrola never promised to remedy any specific issue or correct grievances. In *National Micronetics*, 277 NLRB 993, 993 (1985), the Board found no violation where an employer stated that it had neglected matters in the past and asked for a

²⁴ To the extent that the General Counsel argues in its post-hearing brief that Adelson also unlawfully solicited employee grievances or engaged in other independent conduct that violates the Act, such an argument should be rejected as no such violation is alleged in the Complaint and no motion to amend was made to add such an allegation. (See GC Exh. 1(q), (x)).

second chance to make things better. That was the essence of Gurrola's speech here. As in *National Micronetics*, Gurrola did not make any specific promise that any particular matter would be improved. As the Board stated there: "Generalized expressions of this type, asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda." 277 NLRB at 993; *see also Allied/Egry Business Systems*, 169 NLRB 514, 517 (1968) (no violation where employer delivered message saying that employer and the employees had a very bright future and asking the employees to give the plant manager a chance to prove they did not need an outsider to speak for them because such statements were too vague to support a conclusion that the employer had made unlawful promises to its employees); *Idaho Falls Consol. Hosps., Inc. v. NLRB*, 731 F.2d 1384, 1387 (9th Cir. 1984) ("An expressed willingness to listen to grievances is not sufficient to constitute a violation."); *cf. Rahn Sonoma Ltd.*, 322 NLRB 898, 902 (1997) (employer unlawfully solicited employee grievances where personnel consultant asked employees "why they were trying to bring in a union and what they would change if they could change things").

Gurrola also testified that in her role as Vice President of Human Resources, it is her regular practice to solicit employees' concerns or complaints, primarily in an indirect manner through the staff who attend the racing events. (Tr. 486-487, 488-490, 498-499). In this respect, in February or March, well before the union activity began or the Union filed its petition on October 20, Gurrola learned of employees' complaints regarding their lodging, quality of meals, uniforms, rental cars, per diem/daily allowance payments, and safety issues. (Tr. 488-491). With regard to the complaints about safety, Gurrola stated that NHRA had its Senior Director of Safety and Emergency Services meet with employees at the February Pomona race to discuss their complaints about safety. (Tr. 490-491). Gurrola's testimony about employees registering

complaints about certain conditions of their work is supported by James Dean's testimony. Dean first complained about the adequacy of the meals in mid-February, late April, and early June – four months before the Union's petition was filed. (Tr. 418-419). This allegation should be dismissed.

2. Marleen Gurrola Did Not Threaten Employees With Unspecified Reprisals.

Paragraph 9 of the Complaint further alleges that on September 16 Gurrola threatened employees with unspecified reprisals by informing them there would be “consequences” to forming a union. (GC Exh. 1(q) ¶ 9(b)). However, when the word “consequences” is read in the context of Gurrola's larger statement, it becomes apparent that her use of the word was not threatening nor was there any language that can be characterized as a reprisal. Gurrola's statement was a lawful expression of NHRA's views and opinion on unionization and its possible effects (*i.e.*, consequences), wholly permissible under Section 8(c) of the Act.

It is well settled that an employer does not violate the Act by pointing out the risks of union representation and collective bargaining and urging that those risks be avoided. *See, e.g. Poly-America, Inc.*, 328 NLRB 667, 669 (1999) (“It is well settled that Section 8(c) . . . gives employers the right to express their views about unionization or a particular union as long as those communications do not threaten reprisals or promise benefits”); *Children's Center for Behavioral Dev.*, 347 NLRB 35, 35 (2006) (“an employer may criticize, disparage or denigrate a union without running afoul of Section 8(c)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees”). Further, “employer statements must be viewed in context and not in isolation to determine if they have the reasonable tendency proscribed by Section 8(a)(1).” *Flying Foods Grp., Inc.*, 345 NLRB 101, 105-106 (2005).

Here, on September 16, Gurrola stated, in relevant part:

You all have every right . . . and I don't want to make any qualms about it, you have every right to talk to a union rep [pause -- background noise] to engage in conversations with them and [unintelligible] and even vote the union in if that is what you choose to do. But, I want to tell you that, you know, I want to tell you what NHRA thinks about it or what I think about it as a matter of fact [background noise] in human resources.

Um, we don't feel that it is, it is a productive thing to-uh-a relationship to get into. For starters, uh, and there are consequences, okay?

A lot of you may or may not have been asked to sign a card to join the union and by doing so, you should know a couple of things. One is, that you are giving them the right to represent you whether there is a vote or not a vote.

And, we don't want you to sign the card. We don't feel there's a need to do that. Once you entered into—once there's a union, there's now a third party in our relationship.

(GC Exh. 26(b)). The generalized reference to “consequences” in Gurrola’s statement can reasonably be understood as pertaining to the effects of unionization, not that the employees would suffer from adverse consequences for unionizing or that NHRA would retaliate against them for supporting the union. *Cf. Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456, 1490 (2011) (respondent violated Section 8(a)(1) by its manager’s threat to an employee that there would be “repercussions” if anyone found out that the manager had accused the employee of discussing union matters with other employees and asked about her union sympathies). In fact, Gurrola’s actual words are to the contrary, emphasizing the right to organize and engage in union activity.

That Gurrola made no threat is further corroborated by the tone used by Gurrola when referencing the “consequences” of unionization in the statement, as evidenced by the audio recording of the statement in the record. (GC Exh. 26(a)). Gurrola’s tone contradicts the notion that her use of the word “consequences” implies that employees would suffer adverse consequences as a result of their decisions to unionize. (*See* GC Exh. 26(a), beginning at minute

1:35). Moreover, the statement contains no threats against employees for signing an authorization card or any suggestion that NHRA would retaliate against employees if they chose union representation. Indeed, Gurrola's opening sentence unambiguously states that employees have "every right to talk to a union rep . . . [and] vote the union in," conveying to the audience that NHRA fully recognized employees' rights to form and support a union under the Act. After hearing that opening statement, no reasonable employee would interpret Gurrola's statement as threatening unspecified reprisals for supporting the Union.

Moreover, Gurrola's statement is the sort of campaign speech that the Board has upheld as lawful. *Noah's New York Bagels*, 324 NLRB 266, 267 (1997) (finding that the employer's statement – "I feel strongly that the best way to overcome our mistakes is for us to work together, without the intervention of a third party that costs all of us money yet is not concerned about our well-being. A third party that, despite its costs to both me and you, carries with it no guarantee of the things that are important to us all: job security, fair treatment, good wages and benefits, and a warm friendly work environment." – was not unlawful because it did not make any specific promise that a particular matter would be improved); *United Artists Theatre*, 277 NLRB 115, 115 (1985) (no Section 8(a)(1) violation where employer stated that by voting for the union, employees would vote away their right to deal with management directly); *see also Koons Ford of Annapolis*, 282 NLRB 506, 506 (1986), *enf'd*. 833 F.3d 310 (4th Cir. 1987) (no violation where employer stated that unionization would result in a loss of access to management). This allegation should be dismissed.

3. Marleen Gurrola Did Not Create an Unlawful Impression of Surveillance.

Paragraph 9(c) of the Complaint alleges that Gurrola created an unlawful impression among employees that their protected activity was under surveillance. (GC Exh. 1(q) ¶ 9(c)). The

Board has held that an employer creates an impression of surveillance only if “under the circumstances, the employee could reasonably conclude [from the employer’s statements or conduct] that his protected activities are being monitored.” *Sam’s Club*, 342 NLRB 620, 620 (2004). It has also held that a supervisor’s statement containing only general or known facts, which the supervisor claimed to have “heard,” could not lead an employee to reasonably believe that the employer had embarked on a course of monitoring its employees’ union activities. *Clark Equipment Co.*, 278 NLRB 498, 503 (1986). Similarly, a supervisor’s statement indicating awareness of a rumor pertaining to union activities of the employees would not create an impression of surveillance so long as there is no evidence indicating that the employer could only have learned of the rumor through surveillance. *G. C. Murphy Co.*, 216 NLRB 785, 792 (1975).

Applying this precedent to the statement at issue here, no employee could reasonably conclude that the Gurrola’s remarks about union activity created the impression that NHRA was surreptitiously monitoring union activities. Gurrola’s statement contained only general and known facts about the union activity. She stated, “But I also wanted to talk about another really important thing that has come up and that is the union . . . ‘cause I know that some of you have been approached and talked to about perhaps going in the union . . . and I wanted to have the opportunity to tell you what we think about it.” (GC Exh. 26(b)). The evidence in the record reveals that employees had been discussing the Union since early August 2016, and that the Employer had learned of general union activity from pro-union supervisor Stoll in early September. (*See* Tr. 258, 322-323, 331, 377-378, 431). Further, on September 16 (the same date that Gurrola made her statement), Union Representative John Culleeny approached Adelson, Gurrola, and others in-person at the worksite and stated “Hi, my name is John Culleeny, this [is]

Jason Rosine, we're IATSE, did you know that you have an organizing drive going on?" (Tr. 176). Thus, by September 16, the Union's organizing effort was not covert and NHRA already had knowledge of the organizing drive. Under these circumstances, it would not be reasonable for an employee to believe that unlawful surveillance was the source of Gurrola's information. This allegation should be dismissed.

F. The General Counsel Failed to Show that Michael Rokosa Unlawfully Informed Employees That Union Representation Would Affect Job Offers with NHRA for 2017.

Finally, paragraph 10 of the Complaint alleges that on November 15, Technology Executive Michael Rokosa "in electronic mail, informed employees that Union representation would delay the Respondent in making job offers for the 2017 production season." (GC Exh. 1(q) ¶ 10). The email Rokosa sent to employees on November provides, in full:

Thank you for your work on NHRA TV during 2016!

The 2016 season was a new beginning for our sport. We created a strategic plan and our number one goal was to improve TV. A big part of that plan was for a team of NHRA employees to produce NHRA's TV, instead of an outside party. You all came through and produced great TV this year. Thank you.

Now, we're talking about 2017. We've learned so much this year and we want to make next year even better. It is a jigsaw puzzle to schedule people for events based on availability, needs, regions of the country, etc. The first step is your availability

By November 23, 2016 (if you haven't done so already), please tell us by e-mail to me (mrokosa@nhra.com) your availability for work next year, by event, or simply say "all events" if that is the case (see our 2017 schedule here: <http://www.nhra.com/Schedules/2017.aspx>).

If we do not receive an email with your availability by November 23, 2016, we will understand that you do not want to work for NHRA in 2017.

Because we are in the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly when

we can schedule you to work during 2017, based on your availability and our needs. We will also be able to confirm new terms for 2017. If the union wins the election, we will be obligated to bargain certain terms for the 2017 season and we do not know how long that might take.

When we are able to provide specific offers, we will do our best to make clear the specific expected schedule of travel days and work days so that everyone can plan accordingly.

Have a fantastic holiday season and again, thank you for all of your great work.

(GC Exh. 6). The statements in Rokosa's email regarding job offers for 2017 are true and lawful statements. They do not run afoul of Section 8(a)(1). Indeed, "[t]he Board has long held . . . that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment – even where it has previously done so routinely or at regularly scheduled intervals." *Total Sec. Mgmt. Illinois 1, LLC*, 364 NLRB No. 106, slip op. at 1 (2016). "If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue, e.g., the amount of an annual wage increase, it must first bargain with the union over the discretionary aspect." (*Id.* (internal citations omitted)). Rokosa's email indicating that if "the union wins the election," NHRA "will be obligated to bargain certain terms for the 2017 season," informed employees of the realities of having a representative for purposes of bargaining, and that NHRA could not unilaterally make job offers without consulting the union if it won the election. Neither the General Counsel nor the Union could seriously doubt that a duty to bargain over the contents of the job offers, e.g., wages, travel wages, employment status, meals and per diem, and the like, would not arise in the event that the Union won the election. The statements here served to communicate that fact to the employees.

Further, when read in full, it is unlikely a reasonable employee would interpret the email as expressing that Union representation would delay job offers for the 2017 season. Certainly,

none of the General Counsel's four employee witnesses testified to interpreting it in such a manner. Instead, it is more plausible that an employee would interpret the email as expressing the fact that during the pendency of the election, NHRA is adopting a reasonable "wait-and-see" approach to determine how the outcome of the vote would impact its 2017 operation, not that NHRA would refuse to make job offers if the Union won the election or refuse to bargain with the Union. This is consistent with Rokosa's testimony on making job offers for 2017. (*See* Tr. 664-666). Moreover, the record evidence demonstrates that for 2017, NHRA made its initial job offers in late December and January 2017, which was consistent with its practice and without any delay. (Tr. 665).

Finally, it is worthy of note that had NHRA made job offers during the pendency of the election, the offers could have given rise to a charge against the Employer alleging that the Employer unlawfully conferred benefits on employees to influence their decision or the election outcome. Thus, the Employer here is placed in an impossible "Catch-22" dilemma whereby both offering jobs for the subsequent racing season, and communicating to employees that it was holding off on doing so until the election results were known could have equally constituted violations of the Act. This simply cannot be, and this allegation should be dismissed.

CONCLUSION

For the foregoing reasons, NHRA respectfully requests that the Complaint be dismissed in its entirety and that the election be set aside, or in the alternative, that the ballots of Todd Veney, Paul Kent, and Patrick Ward be opened and counted.

Dated this 21st day of May 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing POST-HEARING BRIEF by electronic mail on the following parties:

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